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REPORTS OF CASES

HEARD AND DETERMINED BY

THE LORD CHANCELLOR

AND THE

COURT OF APPEAL IN CHANCERY.

BY

J. P. DE GEX, S. MACNAGHTEN, AND A. GORDON, Esqs.,

BARRISTERS AT LAW.

EDITED,

WITH NOTES AND REFERENCES TO AMERICAN LAW,
AND SUBSEQUENT ENGLISH DECISIONS,

BY

J. C. PERKINS.

VOL. VI.

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SIR RICHARD BETHELL,
THE RIGHT HONOURABLE JAMES ALEX- } SOLICITORS-GENERAL.
ANDER STUART WORTLEY,

MEMORANDA.

On the 19th of November, 1856, Sir Alexander James Edmund Cockburn, Knight, Her Majesty's Attorney-General, was appointed Lord Chief Justice of the Court of Common Pleas, in the place of the Right Honourable Sir John Jervis, Knight, deceased.

On the 22d of November, Sir Richard Bethell, Her Majesty's Solicitor-General, was appointed to be Her Majesty's Attorney-General, in the place of Sir Alexander James Edmund Cockburn.

On the same day, the Right Honourable James Alexander Stuart Wortley, Q.C. and Recorder of London, was appointed to be Her Majesty's Solicitor-General, in the place of Sir Richard Bethell.

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REPORTS OF CASES
ARGUED AND DETERMINED
IN THE
HIGH COURT OF CHANCERY.

REPORTS OF CASES
• ARGUED AND DETERMINED
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HIGH COURT OF CHANCERY.

HAWKINS v. GATHERCOLE.

1854. November 23, 24, 25. 1855. January 19, 24. Before the LORDS JUSTICES.

A registered judgment against a clergyman does not create a charge upon his benefice entitling the judgment creditor to the appointment of a receiver under 1 & 2 Vict. c. 110.¹

THESE were two appeals from a decree of Vice-Chancellor KINDERSLEY, founded in principle upon a decision of Vice-Chancellor Lord CRANWORTH, granting an interlocutory injunction in the same case. The case is reported on the application for an injunction in the first volume of Mr. Simons' New Series of Reports. (a) The facts were shortly these:—

By an indenture dated the 8th of August, 1845, the Rev. M. A. Gathercole made a mortgage in fee to the plaintiff Mr. Hawkins, for securing the repayment of 24,000*l.* with interest. At the same time, Mr. Gathercole executed a warrant of attorney for 49,000*l.*, on which judgment was entered up and registered under the provisions of the Statute 1 & 2 Vict. c. 110, on the 5th of September in the same year. Five years afterwards the *judg- *2 ment was re-registered. Shortly afterwards, Mr. Gathercole became, upon his own presentation, vicar of Chatteris Nuns, in the Isle of Ely. In September, 1849, Mr. Hawkins issued a writ of *fiery facias* for the recovery of arrears of interest on the debt;

(a) Page 63.

¹ See 2 Dan. Ch. Pr. (4th Am. ed.) 1730, n. 1.

but the sheriff being unable to raise the full amount a sequestration was issued, under which the remainder of the arrears of interest was obtained. Other judgment creditors afterwards issued sequestrations against the benefice. Mr. Hawkins then filed the bill in the present suit against Mr. Gathercole, the Bishop of Ely, and the other judgment creditors, praying that the plaintiff might be declared entitled to have his debt and interest paid in priority to the judgments of the other judgment creditors, and that the plaintiff's judgment might be declared a charge upon the vicarage, and that the bishop might be restrained from executing the sequestrations of the other creditors, and that a receiver might be appointed of the rents, tithes, and rent-charges belonging to the vicarage.

It was upon the motion for the injunction and receiver thus prayed for that Lord CRANWORTH, then Vice-Chancellor, on the 21st of November, 1850, held that the judgment was a charge upon the living, under the 1 & 2 Vict. c. 110, § 13, (a) and

(a) 1 & 2 Vict. c. 110, § 13. "And be it enacted, that a judgment already entered up or to be hereafter entered up against any person in any of her Majesty's superior Courts at Westminster, shall operate as a charge upon all lands, tenements, rectories, advowsons, tithes, rents, and hereditaments (including lands and hereditaments of copyhold or customary tenure), of or to which such person shall, at the time of entering up such judgment, or at any time afterwards, be seised, possessed, or entitled for any estate or interest whatever at law or in equity, whether in possession, reversion, remainder, or expectancy, or over which such person shall at the time of entering up such judgment or at any time afterwards, have any disposing power which he might, without the assent of any other person, exercise for his own benefit, and shall be binding as against the person against whom judgment shall be so entered up, and against all persons claiming under him after such judgment, and shall also be binding as against the issue of his body, and all other persons whom he might, without the assent of any other person, cut off and debar from any remainder, reversion, or other interest in or out of any of the said lands, tenements, rectories, advowsons, tithes, rents, and hereditaments, and that every judgment creditor shall have such and the same remedies in a Court of Equity against the hereditament so charged by virtue of this Act or any part thereof as he would be entitled to, in case the person against whom such judgment shall have been so entered up, had power to charge the same hereditaments, and had, by writing under his hand, agreed to charge the same with the amount of such judgment debt and interest thereon: provided that no judgment creditor shall be entitled to proceed in equity to obtain the benefit of such charge until after the expiration of one year from the time of entering up such judgment, or in cases of judgments already entered up or to be entered up before the time appointed for the commencement of this Act, until after the expiration of one year from the time appointed for the commencement of this Act, nor shall such charge operate to give the judgment creditor any preference

made an order which, * after referring it to the Master to * 3 appoint some proper person to receive, collect, and get in the in case of the bankruptcy of the person against whom judgment shall have been entered up, unless such judgment shall have been entered up one year at least before the bankruptcy: provided also, that as regards purchasers, mortgagees, or creditors who shall have become such before the time appointed for the commencement of this Act, such judgment shall not affect lands, tenements, or hereditaments, otherwise than as the same would have been affected by such judgment, if this Act had not passed: provided also, that nothing herein contained shall be deemed or taken to alter or affect any doctrine of Courts of Equity, whereby protection is given to purchasers for valuable consideration without notice."

The following sections of the Act were also referred to in the argument: —

Sect. 11. "And whereas the existing law is defective in not providing adequate means for enabling judgment creditors to obtain satisfaction from the property of their debtors, and it is expedient to give judgment creditors more effectual remedies against the real and personal estate of their debtors than they possess under the existing law: be it therefore further enacted, that it shall be lawful for the sheriff or other officer to whom any writ of *elegit* or any precept in pursuance thereof shall be directed at the suit of any person upon any judgment which at the time appointed for the commencement of this Act shall have been recovered or shall be thereafter recovered in any action in any of her Majesty's superior Courts at Westminster, to make and deliver execution unto the party in that behalf suing of all such lands, tenements, rectories, tithes, rents, and hereditaments, including lands and hereditaments of copyhold or customary tenure, as the person against whom execution is so sued, or any person in trust for him, shall have been seised or possessed of at the time of entering up the said judgment or at any time afterwards, or over which such person shall at the time of entering up such judgment, or at any time afterwards, have any disposing power which he might, without the assent of any other person, exercise for his own benefit, in like manner as the sheriff or other officer may now make and deliver execution of one moiety of the lands and tenements of any person against whom a writ of *elegit* is sued out; which lands, tenements, rectories, tithes, rents, and hereditaments, by force and virtue of such execution, shall accordingly be held and enjoyed by the party to whom such execution shall be so made and delivered, subject to such account in the Court out of which such execution shall have been sued out as a tenant by *elegit* is now subject to in a Court of Equity: provided always, that such party suing out execution, and to whom any copyhold or customary lands shall be so delivered in execution, shall be liable and is hereby required to make, perform, and render to the lord of the manor or other person entitled, all such and the like payments and services as the person against whom such execution shall be issued would have been bound to make, perform, and render, in case such execution had not issued, and that the party so suing out such execution, and to whom any such copyhold or customary lands shall have been so delivered in execution, shall be entitled to hold the same until the amount of such payments and the value of such services, as well as the amount of the judgment, shall have been levied: provided also, that as against purchasers,

* 4 corn rents, rents * in lieu of tithes, and all other rents of what kind soever, offerings, fruits, oblations, obventions, pensions, * 5 portions, * and all other the commodities and emoluments, hereditaments and premises belonging or appertaining to the vicarage of Chatteris Nuns, and to allow him a proper salary for his care and pains therein, and after directing the persons respectively liable to make payments in respect of the matters aforesaid, to make such payments to such receiver, directed that the receiver should provide for the service of the church of the said parish, and make and pay a proper allowance and remuneration to the persons serving the same, and the receiver was to be allowed what he should so pay in passing his accounts before the said Master. And it was ordered, that the receiver should from time to time pass his accounts before the Master, and pay the balances which should be reported due from him (after paying such allowance and remuneration for the service of the said church as aforesaid), into the bank, with the privity of the Accountant-General. And it was ordered, that an injunction should be awarded to restrain the defendant, the Bishop of Ely, from executing the several writs of *sequestrari facias* in the pleadings mentioned, and issued against the vicarage and parish church aforesaid, by the defendants whose judgments were subsequent to the plaintiff's. And it was ordered, that an injunction be awarded to restrain those defendants from procuring to be executed or otherwise proceeding with the writs of *sequestrari facias* issued on their several judgments in the pleadings mentioned, and from further prosecuting, or from taking * 6 or permitting to be taken any proceeding * upon the said judgments against the said vicarage and parish church, and

mortgagees, or creditors, who shall have become such before the time appointed for the commencement of this Act, such writ of *elegit* shall have no greater or other effect than a writ of *elegit* would have had in case this Act had not passed."

Sect. 55. "And be it enacted, that nothing in this Act contained shall extend to entitle the assignee or assignees of the estate and effects of any such prisoner, being a beneficed clergyman or curate, to the income of such benefice or curacy for the purposes of this Act: provided always, that it shall be lawful for such assignee or assignees to apply for and obtain a sequestration of the profits of any such benefice for the payment of the debts of such prisoner, and the order appointing an assignee or assignees of such prisoner, in pursuance of this Act, shall be a sufficient warrant for the granting of such sequestration without any writ or other proceedings to authorize the same, and such sequestration shall accordingly be issued as the same might have been issued upon any writ of *levari facias* founded upon any judgment against such prisoner."

from receiving the rents, tithes, and rent-charges of the said vicarage, or any part thereof, until the hearing of the cause or further order.

On the 2d of July, 1852, Vice-Chancellor KINDERSLEY, on a motion to commit a judgment creditor, named Carrack, for contempt, in issuing a sequestration while the property was in the hands of the receiver, directed that Mr. Carrack should pay the costs of the application, but that (Mr. Carrack submitting to deal with his sequestration as the Court should direct, and undertaking that the sequestrator in that character should not receive, collect, or levy any portion of the issues or profits of the living, without the leave of the Court) no further order should be made on the motion.

On the 17th of August, 1852, the Vice-Chancellor made an order on the petition of Mr. Gathercole, directing the receiver to pay to the petitioner 150*l.* per annum, so long as he continued to perform or provide for the services of the church.

On the cause coming on to be heard, the Vice-Chancellor considered himself bound by the decision of Lord CRANWORTH, and made a decree, declaring among other things that the plaintiff's judgment was a charge on the corn rents and other profits of the living (using the same words as those of the order for a receiver), and decreeing consequential relief. The other judgment creditors appealed from this part of the decree.

Mr. Baily and *Mr. G. Simpson*, in support of one of the petitions of appeal. *Mr. Giffard* and *Mr. Bonham Carter*, in support of the other. — The Vice-Chancellor considered himself bound by the decision upon the motion for an injunction and a receiver.

* The question was, however, in a different position before his * 7 Honor from that in which it came before Lord CRANWORTH on the motion. It was sufficient ground for the order then made that there was a substantial question to be tried. Moreover, it had not then occurred to the counsel who argued the case to call the attention of the Court to the similarity of the language of the Statute of Frauds to that of the 1 & 2 Vict. c. 110. Now the words of the Statute of Frauds (a) are these : —

“ It shall and may be lawful for every sheriff or other officer to

(a) 29 Car. 2, c. 3, § 10.

whom any writ or precept is or shall be directed, at the suit of any person or persons, of, for, and upon any judgment, statute, or recognizance hereafter to be made or had, to do, make, and deliver execution unto the party in that behalf suing, of all such lands, tenements, rectories, tithes, rents, and hereditaments, as any other person or persons be in any manner of wise seised or possessed, or hereafter shall be seised or possessed, in trust for him against whom execution is so sued, like as the sheriff or other officer might or ought to have done, if the said party against whom execution hereafter shall be so sued, had been seised of such lands, tenements, rectories, tithes, rents, or other hereditaments of such estate as they be seised of in trust for him at the time of the said execution sued; which lands, tenements, rectories, tithes, rents, and other hereditaments, by force and virtue of such execution shall accordingly be held and enjoyed freed and discharged from all incumbrances of such person or persons as shall be so seised or possessed in trust for the person against whom such execution shall be sued."

If, therefore, these words must necessarily be taken in
 * 8 * their utmost generality, the Courts ought to have held that benefices with cure might have been taken in execution before the statute; for the Statute of Frauds assumes that "rectories and tithes of which the debtor is seised may be taken in execution." The contrary, however, has been long settled: *Cottle v. Warrington*; (a) according to that sound rule long adopted in the construction of statutes, that if there is something to satisfy general words in them, and it would be contrary to public policy to apply them in the full extent of their generality, they will be taken to have been used in a restricted sense. So the law will not allow a statute to revoke or alter by construction of general words any prior statute when the words may have their proper operation without it. *Lyn v. Wyn*; (b) Dwaris on Statutes. (c) In *Thompson v. Advocate-General* (d) Lord Chief Justice TINDAL said, (e) "The very general words of the statute, 'every legacy given by any will or testamentary instrument of any person,' must of necessity receive some limitation in their application, for they

(a) 5 B. & Ad. 447.

(d) 12 Cl. & Fin. 1.

(b) Bridgman's Judgments, p. 122.

(e) Page 17.

(c) Second ed. p. 532.

cannot in reason extend to every person, everywhere, whether subjects of this kingdom or foreigners, and whether at the time of their death domiciled within the realm or abroad." In the *Dean of Ely v. Bliss*, (a) Lord ST. LEONARDS held that the word "rent" in the 3 & 4 Will. 4, c. 27, must not be construed in its usual or unrestricted sense, so as to include rent reserved by a lease, but must be held to mean only rent of inheritance; inasmuch as a different construction would abrogate the provisions of another Act of Parliament (2 & 3 Will. 4, c. 100). Now, to construe the 1 & 2 Vict. * c. 110, § 13, as it has been here * 9 construed, virtually abrogates the 13 Elizabeth, c. 20, § 1, which provides thus, "That the livings appointed for ecclesiastical ministers may not, by corrupt and indirect dealings, be transferred to other uses, be it enacted by the authority of this present Parliament, that no lease after the 15th day of May next following the beginning of this Parliament, to be made of any benefice or ecclesiastical promotion with cure or any part thereof, and not being impropriated, shall endure any longer than while the lessor shall be ordinarily resident and serving the cure of such benefice without absence above fourscore days in any one year, but that every such lease, so soon as it or any part thereof shall come to any possession or use above forbidden, or immediately upon such absence, shall cease and be void, and the incumbent so offending shall for the same lose one year's profit of his said benefice, to be distributed by the ordinary among the poor of the parish; and that all chargings of such benefices with cure hereafter with any pension or with any profit out of the same to be yielded or taken hereafter to be made other than rents to be reserved upon leases hereafter to be made according to the meaning of this Act shall be utterly void."

[THE LORD JUSTICE KNIGHT BRUCE. — Has attention ever been called to the form of the order appointing a receiver of a benefice?]

The general form of the order was, as we are informed, framed in the interval of fourteen years, from 1803 to 1817, during which the statute of Elizabeth was not in operation.

(a) 5 Beav. 574; 2 De G., M. & G. 459.

[THE LORD JUSTICE KNIGHT BRUCE. — Was the question ever discussed, or was it taken for granted that, by the common law, a charge on a benefice might be valid?]

It seems never to have been discussed, and the words of the order framed while the statute of Elizabeth was not in force, have probably been by inadvertence since retained. We have not
 * 10 been able to find a reported * case in which there has been any discussion as to the form of the order. It was probably taken *verbatim* from the form of a writ of sequestration.

[The Lord Justice KNIGHT BRUCE referred to *Couraud v. Harmer* and *Littleboy v. Spooner*; Seton on Decrees. (a)]

In *Digby v. Irvine*, (b) it was sought to apply the provisions of the Irish Act (3 & 4 Vict. c. 105) to the separate property of a married woman against whom with her husband judgment had been obtained. The 19th section of that Act provides, that the sheriff may take all lands, &c., over which the person against whom the execution is issued has any disposing power which he might, without the consent of any other person, exercise for his own benefit. But Mr. BLACKBURNE, the Master of the Rolls, said, "To remedy the several defects and mischiefs which I have stated, appears to me to be the whole scope and object of the 19th section: this remedy consists in giving to the judgment creditor the right to extend the whole, instead of a moiety of the lands of his debtor; in binding the trust estate and chattels real by the judgment from the time of its rendition; in making copyhold lands liable to the judgment, and in preventing the injustice caused by the retrospective operation of powers executed by judgment debtors. But there is not a single intimation of an intention of the legislature to enlarge the description or change the character of the estates which might be extended upon an *elegit* under the Statute of Westminster or the Statute of Frauds; and, therefore, I think the question now under consideration must be governed by the same rules and authorities by which the nature of the trust estates, liable to execution under the Statute of Frauds, was defined and ascer-

(a) Page 552 (2d ed.).

(b) 6 Irish Eq. 149.

tained previous to the * enactment of the statute under con- * 11
sideration."

[THE LORD JUSTICE KNIGHT BRUCE. — Does not your argument require eight words to be struck out of this portion of the 13th section of 1 & 2 Vict. c. 110, "in case the person against whom such judgment shall have been entered up had *power to charge the same hereditaments and had* by writing under his hand agreed to charge the same" ?]

There might be cases to which the words might apply, for instance the case of an estate tail. Moreover, the words cannot be literally construed, for so interpreted they would render a judgment against one man a charge on the lands of another. It is remarkable that "vicarages" are not mentioned in the Act, and from this as well as from the arguments already adduced, it is clear that the Act was intended to apply to lay rectories only. If a valid charge is created, all the consequences of it must follow, including a right of foreclosure or sale, which never could have been intended.

They also referred to the following cases: *Heydon's Case*, (a) *Lord Darcy's Case*, (b) *Arbuckle v. Cowtan*, (c) *Bishop v. Hatch*, (d) *Alchin v. Hopkins*, (e) *Saltmarshe v. Hewett*, (g) *Cottle v. Warrington*, (h) *Harding v. Hall*, (i) *Cuddington v. Withy*, (k) *Colebrook v. Layton*, (l) *Johnson v. Holdsworth*, (m) *Fletcher v. Steele*, (n) *Archbold's Practice*. (o)

Mr. Swanston, Mr. Baddeley, and Mr. Sidney Smith; for the plaintiff. — Before the 1 & 2 Vict. c. 110, passed, benefices could * not, it is true, be, expressly and in terms, charged, * 12 but they might be so in substance. A warrant of attorney to enter up judgment had long been in use to accomplish this purpose. The judgment did not then charge the living, but the living was taken under a sequestration.

(a) 3 Rep. 7 a.

(b) Cro. Eliz. 512.

(c) 3 Bos. & Pul. 321.

(d) 1 A. & E. 171.

(e) 1 Bing. N. C. 99.

(g) 1 A. & E. 812.

(h) 5 B. & Ad. 447.

(i) 10 M. & W. 42.

(k) 2 Swanst. 174.

(l) 4 B. & Ad. 578.

(m) 1 Sim. N. S. 106.

(n) 6 Ir. Eq. 376.

(o) Page 599 "*Elegit*."

[THE LORD JUSTICE KNIGHT BRUCE. — But it was sequestered by the officer of the bishop. Could a Court of Law interfere, in such a case, with the amount of the stipend to be paid to the officiating minister?]

It has authority to do so. *Morris v. Phelps*. (a) In that case, the Court of Law dealt with the bishop as an officer subject to its jurisdiction, and made a rule absolute, calling on a bishop to show cause why accounts of all moneys levied under writs of *fi. fa.* should not be referred to the Master to examine the deductions from the sum levied, as stated in the bishop's return to a writ of sequestration, and to say whether they were proper to be allowed.

These are grounds for contending that before the 1 & 2 Vict. c. 110, benefices were subject not only to sequestration, but also to an ordinary execution under an *elegit*; *Arbuckle v. Cowtan* (b) is unsatisfactory, for it proceeds upon the authority of a passage in Gilbert on Executions, (c) where it is said, "*elegit* does not lie of the glebe belonging to the parsonage or vicarage, nor to the churchyard, for these are each *solum Deo consecratum*," and the reason here assigned is incorrect in point of fact. The reason why precedents are not found of *elegits* is, that under an *elegit* only half the profits could be taken, while under a sequestration the whole were applied. The latter remedy was consequently
 * 13 * preferred. But although it might for these reasons be successfully contended that a benefice might even be taken in execution, it is not necessary to carry the argument so far. For it might be conceded that the sheriff could not seize the profits of a benefice, and yet it would not follow that they are not within the 13th section, for this section introduces a totally new enactment, and not, like the 11th section, merely an extension of an old one. It is not necessary that the property to be comprised in the 13th section should be such as could have been taken in execution before the Act passed. The intention of the 1 & 2 Vict. c. 110, was to change substantially the law of debtor and creditor. In *Harris v. Davison*, (d) Sir L. SHADWELL said, "The act is a remedial one; and, therefore, ought to receive a liberal construction. The whole object of the legislature was to give creditors a

(a) 4 Exch. 895.

(b) 3 Bos. & Pul. 321; and see *Wise v. Beresford*, 3 D. & W. 286.

(c) Page 40.

(d) 15 Sim. 128, 133.

more effectual remedy against the property of their debtors than they had under the old law, in compensation for the remedy against the persons of their debtors which the Act took away from them. What the legislature meant was to facilitate the obtaining payment of debts, and to do away with the punishment of debtors." And in *Whitworth v. Gaugain*, (a) Lord COTTENHAM thus expressed himself: "The object of the Act was to give to creditors more effectual remedies against the estate of their debtors." There is no valid objection to a beneficed clergyman charging his living. It does not injure the church. The church is provided for, and then the contest is only between a creditor with a just debt owing to him and a debtor who will not pay it. *White v. Bishop of Peterborough* (b) and *Metcalf v. Archbishop of York* (c) show that there was no objection at common * law to charging a * 14 benefice. The judgment of Lord ELDON in *Silver v. Bishop of Norwich*, reported in the note to the former of those cases, (d) was in writing, and is printed from the manuscript. The order in that case is set out at page 117 of the report. The Irish cases cited only apply to the sections respecting executions.

With respect to the omission of the word "vicarages," on which stress has been laid, the general words of the Act are sufficient to comprehend the temporalities of a vicarage, the endowments of which are usually tithes and glebes. Moreover, as the statute is a remedial one, "vicarages" would be held to be included in the term "rectories." There are authorities to that effect in the books of ecclesiastical as well as common law. (e) In 13 Edw. 1, stat. 1 (Westminster the Second), c. 24, the words "*persona alicujus ecclesie*," are said, by Lord COKE, (g) to include vicars. So in 35 Edw. 1, stat. 2, and 9 Edw. 2, stat. 1, c. 9.

With regard to the comparison of the language of the 1 & 2 Vict. c. 110, with that of the Statute of Frauds, the objects of the two Acts must be considered, and having regard to this it does not follow that the same language is necessarily to be applied in the same manner in both. Nor is there any ground for the argument that the authority of the bishop will be interfered with. When the legislature gives authority to a tribunal, it assumes that

(a) 1 Phil. 728-734.

(d) 3 Swanst. 112.

(b) 3 Swanst. 109.

(e) Lindwoode, pp. 23, 24, 25.

(c) 1 Myl. & Cr. 547.

(g) 2 Inst. 407.

the authority will be exercised with due regard to the rights of all parties and to other parts of the law.

[THE LORD JUSTICE KNIGHT BRUCE. — Might not the receiver be a respectable and worthy Jew ?]

* 15 He * might, and so might a sequestrator. All that can be charged or taken by a receiver is that which by law is not required for the service of the church. Those duties which are by law the first charges must be provided for, and there is no pretence for supposing that the Court of Chancery would not by communication with the bishop or otherwise make due provision for them. All the acts of a receiver take place under the immediate superintendence of the Court.

They also referred to *Mouys v. Leake*, (a) *Colebrook v. Layton*, (b) *Benday v. Price*, (c) *Can v. Heaton*, (d) *Doe v. Angell*, (e) *Lane v. Horlock*, (g) *Cuddington v. Withy*, (h) *Moore v. Ramsden*. (i)

Mr. Greene appeared for the incumbent.

Mr. Speed, for the Bishop of Ely.

Mr. Baily, in reply. — With respect to the precedents of decrees during the time when the Act of Elizabeth was not in force, it does not appear that Lord ELDON's attention was drawn to the form of them.

[THE LORD JUSTICE KNIGHT BRUCE. — The 55th section of the 1 & 2 Vict. c. 110, appears to provide very well for the difficulty in case of insolvency.]

The only question discussed before Lord ELDON appears to have been, whether judgment creditors had priority over an equitable

(a) 8 T. R. 411; see 11 M. & W. 772.

(b) 4 B. & Ad. 578.

(c) 7 Dowl. P. C. 753.

(d) 3 Gwillim on Tithes, 1258.

(e) 9 Q. B. 328.

(g) 1 Drew. 606.

(h) 2 Swanst. 174.

(i) 7 A. & E. 898.

charge, the validity of the equitable charge itself having been never disputed, but taken for * granted. The difficulty as to * 16 providing for the service of the church never seems to have been brought to Lord ELDON's attention, and in the orders the form adopted in a writ of sequestration was adopted. With respect to the words of the Act, the same words are used in the 11th and 13th sections, and must have the same effect given to them. We have shown that in the 11th section they do not apply to ecclesiastical benefices. Neither can they therefore in the 13th.

Judgment reserved.

1855. January 19.

THE LORD JUSTICE KNIGHT BRUCE. — The principal question for decision in this litigation is of the interpretation to be put on the 13th section of the Statute of the 1st & 2d of the Queen, c. 110, with regard to the case of a beneficed clergyman against whom a judgment having been entered up, the fruits of his vicarage are alleged on one side and denied on the other to fall within the operation of the section.

It cannot, I apprehend, be denied that by the law of this country, as it stood at the time when the Act passed, a beneficed clergyman was prohibited and disabled from charging and from contracting to charge the fruits of his living or any part of them even as against himself, — a point as to which it must be unnecessary now to mention particularly that numerous class of cases to which *Arbuckle v. Cowtan*, (a) *Bishop v. Hatch*, (b) *Alchin v. Hopkins*, (c) and *Saltmarshe v. Hewett* (d) belong. And it seems to me equally clear that the law in this respect was founded on considerations of public policy, that is to say, the general good of society, and especially the temporal support of the national religion. That general good was, in my judgment (if I may properly express an opinion upon the matter), well consulted by this provision of our institutions, whether new in the reign of Elizabeth or of earlier origin. Nor has the law in this regard been, as I believe, altered during the present reign. Still it is illegal, still impossible for a beneficed clergyman to make an effectual contract for charging even against himself the whole or any

(a) 3 B. & P. 321.

(b) 1 A. & E. 171.

(c) 1 Bing. N. C. 99.

(d) 1 Ad. & E. 812.

portion of the fruits of his living: at least so I understand the matter. If, however, the plaintiff's present contention is well founded, a creditor of an ecclesiastical rector or of a vicar has but to obtain a judgment against the debtor for the debt, in order to be, so far as equitable rights and equitable remedies are concerned, in the same position as if he had been capable of contracting and actually contracted to charge, at least as against himself, the property belonging to him in right of his church or vicarage, directly with the debt; one consequence of which must, I suppose, be the liability of the property to foreclosure or sale for the whole period of the incumbency under a decree of the Court of Chancery according to its common course of dealing with equitable mortgages, and to have a receiver placed on it by the same authority at the instance of the creditor, a receiver under an order, for instance, such as one of those now before us, thus expressed: [his Lordship read the order of the 21st November, 1850, the substance of which is set out above.]

* 18 * It is obvious that such a receiver is not a sequestrator, is not the bailiff or servant of the ordinary, but is an officer of this Court.¹ In the case before us there happens to be a sequestrator also, and it happens that the sequestrator is likewise the receiver. Upon the plaintiff's theory, however, it might be otherwise. The sequestrator and the receiver may be different persons, or there may be a receiver and no sequestrator. How such a state of things can be reconciled with convenience, with policy, with ecclesiastical discipline, or with order, I am unable to perceive. I do not see, for example, how it can be fitting or right for the Court of Chancery to be placed in the position of having to pronounce an order such as that of August, 1852, made by a Vice-Chancellor in the course of the present litigation, which I will venture to read. [His Lordship read the order of the 17th August, 1852.]

These considerations have not, I acknowledge, predisposed me

¹ 2 Dan. Ch. Pr. (4th Am. ed.) 1715; *Hewett v. Adams*, 54 Maine, 214; *Tillinghast v. Champlin*, 4 R. I. 173; *Lottimer v. Lord*, 4 E. D. Smith, 183; *In re Colvin*, 3 Md. Ch. Dec. 278. A receiver is at all times entitled to the advice and protection of the Court. *Hewett v. Adams*, 54 Maine, 214; *Cammack v. Johnson*, 1 Green Ch. 173; 2 Dan. Ch. Pr. (4th Am. ed.) 1715, n. (4). He acts under the supervision of the Court, the property in his hands being in the custody of the law. *Hooper v. Winston*, 24 Ill. 353; 2 Dan. Ch. Pr. (4th Am. ed.) 1743.

to the plaintiff's construction of the statute of the present reign, that we are now dealing with; nor ought, in my opinion, that interpretation to prevail, unless inevitable. Is it inevitable? I think not. True, the words descriptive of property in the 13th section are large and general, though the mere mention of "rectories" and "tithes" does not, I conceive, advance the plaintiff's argument, whether we refer to the Statute of Frauds or not. But, assuming the words to be extensive enough to cover such property as that in dispute, still it is impossible for us not to see that there is property confessedly and indisputably falling within the section, much more than sufficient to give operation to every part of its description, — a description which, upon every theory, must be deemed redundant. And the question, therefore (upon the assumption in the plaintiff's favour that I have mentioned), is, whether, there * not being any reading suggested, according * 19 to which a word is left without effect (so far as that can be true where there is a superabundance of expressions), it is necessary or right to apply them with literal fulness and exactness; whether, after reading the whole statute with a due degree of attention to the nature of the subjects certainly embraced by it, to the state of our institutions and jurisprudence when the Act passed, to the judicial construction that other statutes have by approved decisions received, and to the universally recognized canons by which the interpretation of laws is regulated, we ought to consider the true view of the 13th section as being for or against the present plaintiff. In my opinion it is against him. I am persuaded that the 13th section ought not to be read as extending to property which it was not when the Act passed, nor since has been, possible for a debtor to affect directly by any contract of his own for charging it. I am persuaded that the policy of the statute of Elizabeth was not meant to be interfered with. I think accordingly that the receiver here cannot remain, and that the sequestrations must take effect according to their legal force and order.

As to the sequestration of the defendant Carrack, the order of the 20th July, 1852, and the contempt, or alleged contempt, on the footing of which that order proceeded, I have only to observe, in addition, that the learned Vice-Chancellor who pronounced it, and whose subsequent decree is before us, does not appear to have stated his own view of the modern enactment under consideration. The *ratio decidendi* on a former occasion — the occasion, namely, of

making the interlocutory order of November, 1850, already mentioned — seems to have been regarded by his Honor as rendering it necessary for him to make a particular decree, which decree
 * 20 * he made accordingly. Whether my impression is that it was incumbent on him so to treat the matter, I need not say, but certainly we have not thought that we could properly do so. We have considered it our duty to construe the section for ourselves if possible, and, having done so, to act on the interpretation appearing right to our own minds, though not that which, for the purpose of an interlocutory proceeding in an early stage of the litigation, was adopted by a distinguished lawyer, the great value and great weight of whose opinions can be acknowledged more sincerely by none than by my learned brother and myself.

THE LORD JUSTICE TURNER. — The principal question which we are called upon in this case to decide is, whether under the provisions of the Statute 1 & 2 Vict. c. 110, § 13, a judgment entered up in any of her Majesty's superior Courts at Westminster operates as a charge upon an ecclesiastical benefice, held by the person against whom the judgment is entered up. The language of this section of the statute is as follows: [His Lordship read the 13th section ; see *ante*, p. 2, note (a).]

The enactment extends therefore to rectories and tithes, and if there were no lay rectories or lay tithes, no doubt could be entertained upon the question. But there being both lay and ecclesiastical rectories and tithes, the question arises whether the words rectories and tithes are to be confined in construction to lay rectories and lay tithes, or to be construed as extending also to rectories and tithes constituting ecclesiastical benefices. That such last-mentioned rectories and tithes are within the words of the Act, if literally construed, cannot of course be disputed ; but, in construing Acts of
 * 21 * Parliament, the words which are used are not alone to be regarded. Regard must also be had to the intent and meaning of the legislature.¹ The rule upon this subject is well expressed

¹ The real intention, when accurately ascertained, will always prevail over the literal sense of terms. 1 Kent (11th ed.), 462. The great object of the maxims of interpretation is, to discover the true intention of the law. 1 Kent (11th ed.), 468. See THOMPSON C. J., in *The People v. Utica Ins. Co.*, 15 John. 380; *Whitney v. Whitney*, 14 Mass. 92.

in the case of *Stradling v. Morgan*, (a) in which case it is said, "that the Judges of the law in all times past have so far pursued the intent of the makers of statutes, that they have expounded Acts which were general in words to be but particular, where the intent was particular;"¹ and after referring to several cases the report contains the following remarkable passage, at page 205, "From which cases it appears that the sages of the law heretofore have construed statutes quite contrary to the letter in some appearance; and those statutes which comprehend all things in the letter, they have expounded to extend but to some things; and those which generally prohibit all people from doing such an act, they have interpreted to permit some people to do it; and those which include every person in the letter, they have adjudged to reach to some persons only; which expositions have always been founded upon the intent of the legislature, which they have collected, sometimes by considering the cause and necessity of making the Act, sometimes by comparing one part of the Act with another, and sometimes by foreign circumstances, so that they have ever been guided by the intent of the legislature, which they have always taken according to the necessity of the matter, and according to that which is consonant to reason and good discretion." The same doctrine is to be found in *Eyston v. Studd*, and the note appended to it, also in Plowden, (b) and in many other cases. The passages to which I have referred, I have selected only as containing the best summary with which I am acquainted of the law upon this subject. In determining * the question before * 22 us, we have therefore to consider not merely the words of this Act of Parliament, but the intent of the legislature, to be collected from the cause and necessity of the Act being made, from a comparison of its several parts, and from foreign (meaning extraneous) circumstances, so far as they can justly be considered to throw light upon the subject.

As to the words of the Act, they are, as I have already observed, sufficient to include rectories and tithes constituting ecclesiastical benefices, but then it is to be observed that the words "rectories" and "tithes" used in the Act are not connected with any other words exclusively referring to ecclesiastical benefices. There is not

(a) Plowd. p. 204.

(b) Pages 459, 465.

¹ So when the expression in a statute is special or particular, but the reason is general, the expression should be deemed general. 1 Kent (11th ed.), 462.

a word in the Act having any such exclusive application. Vicarages are not mentioned, nor are other preferments belonging to the higher orders of the church. It was said, indeed, in argument, that the word rectories would include vicarages, and authorities were cited and Acts of Parliament referred to in which the word was so construed, but the construction to be put upon words must depend upon the purposes for which they are used, and upon the surrounding context, and I much doubt whether if this case rested upon the words of the Act alone it would be right, having regard to the purposes and context of the Act, to hold that ecclesiastical benefices fall within those words. I doubt it for this reason. Lord COKE, in his commentary on Magna Charta, (a) states that it is one of the privileges of the clergy, secured to them by Magna Charta, that distresses shall not be taken by sheriffs or other of the king's ministers in the inheritance of the church, wherewith it was anciently endowed. And

again he states this, that if a person be bound in a recogni-
 * 23 zance, and * he pay not the sum at the day, by the common law if the person had nothing but ecclesiastical goods, the recognizee could not have had a *levari facias* to the sheriff to levy the same of these goods, but the writ ought to be directed to the bishop of the diocese to levy the same of his ecclesiastical goods. These privileges remained intact down to the time of this Act of Parliament being passed; and, looking to the cases to which Mr. *Giffard* referred in his argument as collected by Sir F. Dwarries, I very much think that the general words used in this Act ought not, in any event, to be held to have abrogated these privileges, there being ample room for them to operate otherwise.

It is said, however, that the Act, being remedial, is to be construed liberally in favour of the judgment creditors, and that brings me to the cause and necessity of the Act being made. It is immaterial, I think, to consider this with reference to the other purposes of the Act, of which there are several. The legislature has left us in no doubt what, so far as judgment creditors are concerned, the cause and purpose was. The recital of the eleventh section defines it. The reason was the defect in the existing law in not having provided judgment creditors with adequate means to obtain satisfaction from the property of their debtors, and the expediency of giving them more effectual remedies against their

(a) 2 Inst. 3.

debtors' real and personal estates ; but here it is well to observe that it is not all the property of the debtors which is made liable to the judgment creditors. Simple contract debts, for instance, due to the debtor are not made liable: *Harrison v. Paynter* ; (a) and further, it may be observed, that amongst the property which is for the first time made liable by the Act, there is none in connection with which any legal or moral obligation * beyond the moral obligation of paying his debts rests upon * 24 the debtor. Thus ecclesiastical goods, although they may be reached by sequestration, are not brought within the grasp of the sheriff. These omissions from the Act point to a more limited construction, and must be taken into account in determining whether and to what extent the liberal construction contended for ought to be applied. In considering that question, regard must be had, not merely to what is contained in the Act, but to what is omitted from it, and also to all the other considerations which bear upon the construction of the Act. Looking at the case in this point of view, I think that no very material weight is due to the argument in favour of the plaintiff founded upon the cause and purpose of the Act.

We are next to collect the intention of the legislature by comparing the several parts of the Act. The 11th section is in these terms: [His Lordship read it ; see *ante*, p. 3, note.]

It is, I think, to be collected from the language of this section that the rectories and tithes referred to in it are lay rectories and lay tithes, and not rectories and tithes constituting ecclesiastical benefices. It is true, indeed, that what the sheriff could take at the time of the passing of the Act is in this section put by way of example, — “ In like manner as he may now make and deliver execution of one moiety of the lands and tenements ; ” but I think that the example applies to the *quantum*, and not to the character of the estate. It is put by way of contrast, that he shall deliver execution of all in like manner as he may now deliver execution of a moiety ; and, although what the sheriff could then deliver execution of is referred to as a moiety of the lands and tenements, it is to be remembered that the word land, which * is alone used in the Statute of Westminster the Second, * 25 had always been construed to include tenements, and that,

(a) 6 M. & W. 387.

by the Statute of Frauds, it is almost in terms defined by the legislature as including lands, tenements, rectories, tithes, rents, and hereditaments: the very words used in this section (the 10th section of the Statute of Frauds) are these: [His Lordship read the section, set out *ante*, p. 7.] It does not seem to me that this section was meant to extend the real estate of which the sheriff could deliver execution. If, before the passing of the Act, he could not deliver execution of an ecclesiastical benefice, — and for the reasons which I have stated I think that he could not, — and no instance has been brought forward of his having done so, — I think that he could not do so after the passing of the Act, but that the words rectories and tithes in the eleventh section must be construed (as they have been in effect construed under the Statute of Frauds) to extend only to lay rectories and lay tithes.

This construction has been already put upon the 19th section of the 3 & 4 Vict. c. 105, which is in terms identical with the 11th section of this Act, in two cases in Ireland: *Digby v. Irvine*, (a) and *Limberoy v. Hilsteau*. (b) In the former of these cases the late Master of the Rolls in Ireland, Mr. BLACKBURNE, the weight of whose judgments cannot be too highly spoken of, expresses himself thus: "There is not a single intimation of an intention of the legislature to enlarge the description or change the character of the estates which might be extended upon an *elegit* under the Statute of Westminster or the Statute of Frauds;" and in the later case the present Master of the Rolls in Ireland, whose authority is also entitled to very great respect, concurred in this opinion of his predecessor, and held that a receiver

* 26 * could not be appointed under the 21st section of the same Act, which empowers the appointment of a receiver of the lands, tenements, rectories, tithes, rents, and hereditaments made liable by the Act.

I think, therefore, both for the reasons I have stated, and upon the authorities to which I have referred, it must be taken as settled, that the words "rectories and tithes" in the 11th section of this Act mean only lay rectories and lay tithes. It was said, however, that, although the construction to be put upon the words rectories and tithes in the 11th section might be thus limited, a more extended construction ought to be put upon the same words as

(a) 6 Irish Eq. 149.

(b) 10 Irish Eq. 633.

used in the 13th section of the Act; but, although the interests which can be reached under the 13th section are more extensive than those which can be reached under the 11th (as might indeed be expected from the difference of the remedies given by the two sections), yet the same terms are used in each section to describe the property which can be affected under them. And the 13th section (as I read the statute) is in effect a supplement to the 11th. Under the 11th section the judgment creditor could take the profits of the property affected by it, but he could take no more. His remedy was in this respect defective, and the 13th section supplies the defect by giving him a charge upon the property. It is difficult to suppose that the legislature could intend to embrace within the same words in different parts of the same Act of Parliament, in the one case, only lay, and, in the other, both lay and ecclesiastical rectories and tithes, more especially when it is considered that the two properties differ so essentially in their character and attributes. There is, indeed, as it seems to me, greater difficulty in construing the words "rectories and tithes," as used in the 13th section, to extend to ecclesiastical rectories and tithes, than there would * be in putting that construction * 27 upon those words in the 11th section; for the context of the 13th section shows, I think, that ecclesiastical rectories and tithes could not be intended to be included in it. The remedy given upon the charge created by this section is to be the same as if the person against whom the judgment is entered up had had power to charge the hereditaments on which the section operates, and had by writing under his hand agreed to charge the same. How could such a remedy be applied in the case of an ecclesiastical benefice? There could of course be no sale and no foreclosure. I may add upon this part of the case that, down to the time of the passing of this Act of Parliament, judgments were not charges on ecclesiastical benefices. *Cottle v. Warrington.* (a)

There is another provision of this statute, which, in comparing its several parts, seems to me of importance to be attended to. By the 55th section it is enacted—[His Lordship read the section, *ante*, p. 4, note.] The assignee, therefore, of a beneficed clergyman becoming an insolvent debtor under the Act, can proceed against the benefice only by sequestration; and it would not, I

(a) 5 B. & Ad. 447.

think, be consistent either with reason or good discretion to hold that whilst an assignee, who stands in the position of a trustee for all the creditors, is thus restricted, it could be intended that a judgment creditor should be at full liberty to proceed, either by execution at law or by a receiver in equity, which he must be entitled to do if the benefice be subject to an *elegit* under the 11th section, or be charged in equity under the 13th section.

This provision was attempted in the argument to be
 * 28 * turned to the advantage of the judgment creditor, upon the ground that it showed that an express exception was deemed necessary for the protection of ecclesiastical benefices, but the observation does not meet the argument arising out of the provision; as the assignment under the Insolvent Debtors Act might be held to operate on the whole estate, and therefore render the exception at least prudent, if not necessary. The observation leaves wholly unaffected the argument, that the circumstance of the provision, not having been applied to property affected by the 11th and 13th sections, tends very much to show that ecclesiastical benefices were not intended to be included in them.

Upon the whole, the conclusion to be derived from the comparison of the several parts of the Act seems to me to be very strong against the position contended for on the part of the judgment creditor. We have then further to consider whether the extraneous circumstances, so far as they bear upon the question, tend to support the argument on the part of the judgment creditor. They seem to me to have a directly opposite tendency. Up to the time of the passing of this Act, the proceeding by sequestration was the known, established, and only mode of subjecting ecclesiastical benefices to the payment of debts. That course of proceeding is referred to by the Act itself in the case of beneficed clergymen becoming insolvent debtors. Could the legislature then have intended silently to abolish it in the case of judgment creditors, and to substitute for it an *elegit* or a receiver? Again, at the very time this Act was passing through Parliament, the Benefices Pluralities Act, 1 & 2 Vict. c. 106, must have been under consideration. That Act gives powers to the bishops, and renders it imperative upon them to appoint curates, and to assign stipends to
 * 29 them in cases of benefices * under sequestration. Would these powers and duties have been confined to cases of sequestration, if it had been supposed that the benefices could be other-

wise affected? But there is another consideration of infinitely greater importance. By the statute of Elizabeth (revived by the Stat. 57 George 3), the clergy are restrained from creating any charge upon their ecclesiastical benefices. They were so restrained upon the most sound principles of public policy. Could it be intended by the legislature itself to create a charge, the creation of which it refused to permit upon the ground of public policy? Was it intended by this Act practically to repeal the statute of Elizabeth? For no one can doubt that if judgments are by this Act made charges upon ecclesiastical benefices, that statute is practically repealed. Clergymen may confess judgments, and the judgments immediately become charges on their benefices, with all the consequences resulting from the provisions of the Act.

It was said, with reference to the first of these considerations, that the bishop was the officer of the Courts of Law to execute the writs of sequestration — the ecclesiastical sheriff — that the Courts of Law would examine his accounts, as they would examine the accounts of the sheriffs, and the case of *Morris v. Phelps* (a) was referred to upon this point. I am not aware to what length the Courts of Law have gone in these cases, or whether they have interfered with the allowances made by bishops to provide for the services of the church. If they have not, the bishops would not seem to stand in all respects in the same situation as sheriffs. They may indeed be officers of the Court, but they would be its officers with discretionary powers. If, on the other * hand, * 30 the Courts of Law have interfered with these allowances, I think it deserves much consideration, whether they have not infringed upon the very principle upon which the proceeding by sequestration against ecclesiastical benefices was grounded. In truth, however, what has been thus urged with reference to this first consideration furnishes no answer to it. Though the bishops may be officers of the Courts of Law under writs of sequestration, they certainly would not be its officers under writs of *elegit*; and I do not see how they could at all be brought before the Courts of Law in proceedings under such writs, much less do I see how the powers which the legislature has given to them in cases of sequestrations could be called into action under such writs.

It was further said with reference to the two first of these con-

(a) 4 Exch. 895.

siderations, that the difficulty arising out of them had been already encountered and surmounted by this Court in the cases which arose whilst the statute of Elizabeth was not in force, but in those cases the charges were deemed to be valid, and this Court was compelled to struggle with the difficulties as best it might. The fact of its having thus dealt with cases which it was compelled to deal with does not negative the existence of the difficulties with which those cases were attended; much less does it furnish any inference of intention on the part of the legislature to authorize the creation of charges on benefices, and thus to recreate those difficulties.

To the argument on the practical repeal of the statute of Elizabeth, which would be the result of giving effect to the claim of the judgment creditor, the answer which was given, as I understood it, was that the benefice would in any event be liable for the
 * 31 debts of the incumbent. * But it is one thing to hold that the benefice would be liable to his debts in the ordinary course of sequestration, another to hold that it is subject to a charge. In the one case the bishop would be no party to the litigation, in the other he would be a necessary party to every suit for enforcing the charge. In the one case the settlement of the allowance to be made for the services of the church would rest with the bishop; in the other this Court must assume to judge of the reasonableness and propriety of the allowance. In short, in the one case the conflict between the spiritual and temporal authorities, which, as I apprehend, the writ of sequestration was devised to avoid, would in every case be avoided. In the other it would in every case be created.

But, again, can the statute of Elizabeth be thus held to be practically repealed by such general words as are contained in the 13th section of this statute? I venture to think that it cannot; grounding that opinion upon the authorities to which I have generally referred, and adding to them the eleventh case in Jenkins, fifth century; (a) in which it is thus said: "A special statute does not derogate from a special statute without express words of abrogation."

I do not think it necessary to enter into the difficulties and inconveniences which would arise from this case being decided in

(a) Jenkins's Centuries, p. 198.

favour of the judgment creditor. They are patent, and were sufficiently adverted to in the course of the argument.

For these reasons my opinion is, that notwithstanding the general words of this statute, judgment debts are * not * 32 charges upon ecclesiastical benefices. Looking to what has already passed in this case upon the motion for a receiver, I give that opinion with diffidence; but although diffident of my own opinion, as I must necessarily be, when differing from one for whose judgment I entertain so high a respect, I do not wish it to be understood that my opinion is on that account less firm or less decided. I have satisfaction in feeling that we can hardly be considered to stand alone in differing from the high opinion to which I have referred. From what fell from the learned judges by whom the cases in Ireland to which I have referred were decided, it can scarcely be doubted what their opinion would have been upon the 13th section of this Act, had it been necessary for them to give any opinion upon it. I am indebted to some gentleman in Ireland for having referred me to the case of *Lemberry v. Helsham*, and as he has not enabled me to thank him personally, I take this opportunity of thanking him publicly for the reference.

There was a subordinate point raised in this case upon a second appeal by the defendant Atkyns, the representative of the defendant Carrack. It appears that the defendant Carrack, having obtained a judgment against Gathercole, issued and published sequestration upon that judgment after the appointment of the receiver, and that a motion having been thereupon made to commit him, he entered into a submission to deal with his sequestration as the Court should from time to time direct, and undertook that his sequestrator should not levy any of the issues or profits of the living without leave of the Court. The facts of this part of the case are sufficiently stated in the report. (a) It was * asked on the part of the plaintiff, that if the Court should * 33 be against him upon the principal point, he might be at liberty to issue a sequestration in priority to Carrack's. Strictly speaking, I apprehend we cannot properly deal with this part of the case, without a motion to discharge the undertaking, but, to save the parties further expense, I have considered the question,

(a) 1 Drewry, 12.

and I think the plaintiff is not entitled to what he asks. He has chosen to adopt a course in which he has failed, and I see no ground for depriving the defendant of the benefit accruing to him from that failure.

BARTLETT v. SALMON.

1855. November 9, 10. Before the Lord Chancellor Lord CRANWORTH.

Bill filed by a purchaser to rescind a contract, the plaintiff alleging that he had been induced to enter into it by fraud and misrepresentation: it appeared that the advertisement out of which the contract arose was of the sale of six houses total rental 131*l.* 6*s.* per annum lease about seventy-five years at a moderate ground-rent of 50*l.* a year, but what the plaintiff, who agreed to give 420*l.* for the property, found himself liable to take was an underlease of the houses at a rent of 50*l.* The Lord Chancellor, reversing the order appealed from, dismissed the bill without costs, being satisfied that though there was a misdescription of the property, there was no such substantial misrepresentation as called upon the Court to exercise its jurisdiction.¹

THIS was an appeal by the defendant from an order made on motion for a decree by Vice-Chancellor Wood, dated the 16th March, 1855, rescinding a contract for purchase, entered into by the plaintiff under the following circumstances.

The plaintiff, John Bartlett, who had been a gentleman's servant, afterwards a beer-shop keeper, and who was at the time of the transaction in question out of business, on the 25th June, 1854, read the following advertisement in the Weekly Despatch newspaper: "Long leasehold estate at Mile End. To be sold,
* 34 a * very pretty little estate of six houses of a genteel character, and in perfect repair, always let to the best description of weekly tenants. Total rental above 130*l.* a year. Lease nearly eighty years, at a moderate ground-rent. Title undeniable. Price only 420 guineas. Apply either by letter or personally at Mr. Salmon's Estate and Rent Offices, 25, Bucklersbury, City."

In consequence of this advertisement, the plaintiff, on the 26th

¹ See *Jennings v. Broughton*, 5 De G., M. & G. 126 and notes (1) and (2); *Sugden V. & P.* (14th Eng. ed.) 243 *et seq.*; (7th Am. ed.) 1 Vol. p. 315 and cases in note (2); 1 Story Eq. Jur. § 195.

June, 1854, went to the office of the defendant Robert Salmon, and, seeing him, made inquiries respecting the premises referred to in the advertisement, and the defendant then put a paper into the hands of the plaintiff, which was in the words and figures following: "For sale by private contract, a very pretty estate of six houses, near Cambridge Road, Mile End; five, letting at 8s. per week each, and one with a shop let at 10s. per week, total rental 131*l.* 6s. per annum. Lease about seventy-five years, at a moderate ground-rent (50*l.* a year). No land-tax. This is a very eligible property for letting to the best sort of paying tenants, and is a thorough good investment. N.B. One old tenant at present pays but 7s. a week. See elevation. Price 420 guineas. To view and obtain all further particulars, you are requested to apply only on Tuesday, June 27th, between ten and four, to Mr. Hodges, at the Artichoke Tavern, Cambridge Road, near Mile End Gate."

On the 27th June, the plaintiff met Mr. Hodges at the Artichoke public-house, and went with him to the premises for the purpose of going over them. He did not, however, go over them all, but only went through the passage of one house into the back yard of that house, and then returned with Mr. Hodges to the Artichoke public-house. (The plaintiff stated that he so acted in consequence of Mr. Hodges representing to *him that the * 35 tenants might be alarmed, and suppose that notice was about to be given them to quit. This statement was, however, denied by Mr. Hodges, who made an affidavit on behalf of the defendant.) Some conversation then took place between the plaintiff and Mr. Hodges, and Mr. Hodges informed the plaintiff that the taxes and outgoings of the premises would not be more than 10*l.* per year, and that the property would clear 15*l.* per centum on the purchase-money. The plaintiff then being, as he alleged, under the impression, from the paper which had been put into his hands, and from the representations of the defendant and Mr. Hodges, that he was about to purchase a valuable leasehold interest by private contract, signed an agreement, already prepared and which was produced to him by Mr. Hodges, who informed him that it was a usual and proper agreement for a sale by private contract, and such as was always kept ready at the defendant's office to be given to and signed by a purchaser.

The agreement, the real effect of which was to bind the plaintiff to take an underlease of the premises at 50*l.* per annum and

to pay 420*l.* down for the underlease, was headed thus: "Sale by private contract of an underlease of six messuages or tenements being Nos. 1, 2, 3, 4, 5, and 6, Norfolk Street, Cambridge Road, Mile End, in the county of Middlesex, for seventy-five years less ten days from Christmas, 1853, at a net rent of 50*l.* per annum payable quarterly." Then followed certain conditions, which it is not necessary to state at length, and at the foot was the following, signed by the plaintiff and Mr. Hodges respectively: "London, 25 Bucklersbury. I, John Bartlett of New Bexley in the county of Kent, do hereby acknowledge myself the purchaser of the property above described subject in all respects to the above

* 36 conditions of sale for the sum of 420*l.* And *I have paid into the hands of Mr. R. Salmon the sum of 84*l.* as a deposit and on account of the purchase-money, and undertake to pay the remainder of such purchase-money and to complete my purchase according to the said conditions of sale. Witness my hand this 27th day of June, 1854. Signed JOHN BARTLETT.

	£	s.	d.
Purchase-money	420	0	0
Deposit paid	84	0	0
	<hr/>		
Balance	£336	0	0
	<hr/>		

"I hereby agree to sell the property within described upon the terms and conditions therein mentioned. Dated this 27th day of June, 1854. For Robert Salmon, C. M. HODGES."

The plaintiff, before signing the agreement, told Mr. Hodges that he was not provided with the 84*l.* required for the deposit, whereupon Mr. Hodges inquired what money he could pay down, and upon being informed that he could pay 5*l.*, Mr. Hodges said that he would take that sum on account and an I. O. U. for the remainder. The plaintiff accordingly paid to Mr. Hodges the sum of 5*l.* in part of the deposit, and signed and gave him an I. O. U. for 79*l.*, the remainder.

The plaintiff then employed a solicitor to complete the purchase. On the 30th June, 1854, the defendant's solicitors sent to the plaintiff a draft of the underlease referred to in the agreement, and which was proposed to be granted, but the same was returned on the next day by the plaintiff's solicitor unperused, accompanied by a letter stating that the plaintiff would file a bill to compel the

delivery up of the agreement and a return of the deposit, on the ground of fraud and misrepresentation. * On the 3d * 37 July, 1854, the defendant brought an action at law to recover the 79l., the amount of the I. O. U.

The bill in the present suit was then filed, which, after stating the facts above mentioned, alleged that the defendant had, about five or six weeks prior to the date of the agreement, raised the rents of several of the houses considerably beyond the value of the same, whereby the apparent aggregate yearly rental of the premises was increased far beyond the yearly value of the same, but which rents the tenants stated, if continued to be enforced, would compel them to leave the houses. It also alleged that the premises were badly built and not in good repair, and if taken on lease according to the agreement for seventy-five years less ten days from Christmas, 1853, at the net yearly rent of 50l. subject to the taxes, outgoings, necessary incidental expenses, and the covenants mentioned in the agreement, would be of no value whatever, and that the rent for so long a term and subject to the covenants would be a high rack-rent to be paid for the premises without the payment of any premium. The bill charged that the plaintiff was induced to enter into and sign the agreement of the 27th June, 1854, and to pay the 5l. in part of the deposit, and to sign and give the I. O. U. for the balance of 79l., entirely through the misrepresentation and fraud of the defendant and his clerk, the said Mr. Hodges; and it prayed that the agreement of the 27th June, 1854, might be declared to be null and void and be delivered up to be cancelled, for an injunction against the action, and that the 5l. deposit might be returned, and the I. O. U. given up.

The cause came on before Vice-Chancellor WOOD, on motion for a decree, on the 16th March, 1855. Affidavits were filed by both parties, those on the part of the * defendant explain- * 38 ing the circumstance alleged in the plaintiff's bill as to the raising of the rents, and denying that the premises were out of repair: the mode, however, in which the Lord Chancellor dealt with the case renders it unnecessary to refer more specifically to their contents. The Vice-Chancellor decided in favour of the plaintiff, considering that the transaction must be set aside on the ground of misrepresentation; that the plaintiff thought he was purchasing the residue of a beneficial lease; that Hodges, who was the defendant's agent, represented the document signed by the

plaintiff as the proper and usual contract for a person to sign who was purchasing the remainder of a lease subject to a ground-rent, when in fact it was no such thing; and that the circumstances relating to the deposit looked very like snatching a contract. His Honor therefore made the order now appealed from, making perpetual an interim injunction which had been granted to restrain the action on the I. O. U., ordering that the agreement of the 27th June, 1854, and the I. O. U. should be delivered up to be cancelled, and that the defendant should pay to the plaintiff the costs of the suit and also the 5*l.* deposit. From this order the defendant now appealed, as above mentioned.

Mr. Rolt and *Mr. Joshua Williams*, for the plaintiff, supported the order. — They stated the facts of the case, drawing attention to the difference between what the plaintiff was led to suppose he was buying and what he really obtained. They referred to *Stewart v. Alliston*, (a) in which Lord ELDON, speaking of ground-rent, said, “Would any man, seeing a house put up to auction as a house to be sold subject to a ground-rent lease, suppose that
* 39 the word ground-rent * meant rack-rent?” They also cited *Mason v. Corder*. (b)

Mr. Daniel and *Mr. Southgate*, for the appellant. — They submitted that there was a great difference between the Court rescinding a contract, as had been done here, and refusing to decree a specific performance, and that this difference had been overlooked by the Vice-Chancellor. *Day v. Newman*. (c) The plaintiff’s bill proceeded entirely on fraud and misrepresentation, but the evidence did not support the allegations, and if the charges of fraud were taken out of the bill, there was no ground of relief stated. The principle of the decisions in *Clermont v. Tasburgh* (d) and *Wilde v. Gibson*, (e) in the latter of which there was alleged concealment by an agent, showed that there was no ground in the present case for rescinding the contract.

[The Lord Chancellor mentioned *Cornfoot v. Fowke*, (g) observing that it was rightly decided in the Exchequer, though it had

(a) 1 Mer. 26; see p. 34.

(b) 7 Taunt. 9.

(c) 2 Cox, 77.

(d) 1 J. & W. 112.

(e) 1 H. L. Cas. 605.

(g) 6 M. & W. 358.

often been commented on and misunderstood. Upon the facts of that case the Court held that the plea of fraud and covin was not made out, and that though the agent had made a representation which was not true, he had only stated what he believed to be true.¹]

The circumstances of the present case are more favourable to the defendant than those which occurred in *Cornfoot v. Fowke*. [They referred to Lord ST. LEONARDS's Concise View of the Law of Vendors and Purchasers, page 149, &c., and see section 34.] If there was a case of fraud, it was unnecessary to come into equity for relief, as the plaintiff would be protected at law.

* *Mr. Joshua Williams* replied. — He referred to Lord St. * 40 LEONARDS's remarks on the case of *Cornfoot v. Fowke* in his work (Concise View of the Law of Vendors and Purchasers, p. 178), where he mentions it as "open to much observation."

[THE LORD CHANCELLOR. — You need not refer to that, as Lord ST. LEONARDS does not entertain the same opinion now. The case was under the notice of the House of Lords in an appeal argued in the course of the last session. (a)]

THE LORD CHANCELLOR. — I apprehend that the jurisdiction of this Court to set aside a contract on the ground of fraud is clear, and that it will always be exercised when the Court is satisfied that a person who has bound himself has been induced so to do by the fraud or contrivance of the other party, and this will be done although there may be a concurrent jurisdiction at law.² It

(a) See *The National Exchange Company of Glasgow v. Drew*, 2 Macq. 103; and in particular, page 108, where the Lord Chancellor gives an explanation of the case of *Cornfoot v. Fowke*, and again, page 144, where Lord ST. LEONARDS, in delivering his opinion to the House, and referring to that case, says, "that was a very peculiar case, and as it was explained by my noble and learned friend on the woolsack, there is no fault to be found with the decision in that case."

¹ See Sugden V. & P. (14th Eng. ed.) 2, 248–251; *Udell v. Atherton*, 7 H. & N. 172; *Coleman v. Riches*, 16 C. B. 104; *Story Agency* (6th ed.), § 139; *National Exchange Co. v. Drew*, 2 Macq. 108; *Fitzsimmons v. Joslin*, 29 Vt. 129–141; 1 *Story Eq. Jur.* § 193 a.

² *Daniel v. Mitchell*, 1 *Story*, 172; *Doggett v. Emerson*, 3 *Story*, 700;

is a most useful head of jurisdiction in equity. There may indeed be cases, short of what I have mentioned, where, without any fraud being committed, a party has been induced to sign something which he ought not to have signed, and in which the Court will be neuter. In the present instance, if the plaintiff is entitled to relief, it must be the relief he asks, because the allegation is,

that he was induced to sign the agreement in question by * 41 fraud and * misrepresentation on the part of the defendant; and the question is, whether this is made out.

The real grievance is, that the plaintiff was misled by contrivance, that by the advertisement and by being kept from inspecting the property he was made to suppose it of larger value than it was. On this, the evidence not only does not satisfy me that the plaintiff's case is well founded, but shows further that the facts really were otherwise. I rely on the documents themselves. The plaintiff thought he was purchasing six small houses as described in the advertisement, and the evidence shows that the property was as represented. The charge, putting out of the question that it was called ground-rent, was 50*l.* a year, and the rents were of the amount stated. It was said that they were fraudulently put up to that amount, but as to this, I think, the explanation is satisfactory. Looking at the evidence, I am not satisfied that there was any misrepresentation of the value of the property. The payment of the rents was said to be safe, and the property was stated to be subject to certain outgoings and to what was called a ground-rent of 50*l.* The outgoings were of about the amount they were represented to be; and this being so, and there being no proof of any misrepresentation of the value, what is there to show that there was any misrepresentation at all? It is said that the property was so described as to lead the plaintiff to suppose that he was taking that interest which the defendant, who was the lessee, himself had, namely, a lease at a ground-rent. The term ground-rent is well understood, and has a definite meaning: it is the sum paid by the owner or builder of houses for the use of land to build on, and is therefore much under what it lets for when it has been built on. If, therefore, a person described property now built on

* 42 as property for which he paid a ground-rent * of 50*l.*, and it

Hough v. Richardson, 3 Story, 659; *Warner v. Daniels*, 1 W. & M. 90; *Smith v. Babcock*, 2 W. & M. 246; *Tuthill v. Babcock*, 2 W. & M. 298, and other cases cited 1 Sugden V. & P. (7th Am. ed.) 315 n. (2).

turned out that what he paid was not ground-rent, but something else, this would be a sort of misleading of the person purchasing. That, however, cannot be said to be the case, when the same advertisement which speaks of the ground-rent mentions also the value of the rack-rent, for it then becomes immaterial what the charge is called, whether it is called ground-rent or by some other name. I therefore confess that I do not understand what deception there was in the present case. It can only be this, that the plaintiff was informed by Mr. Hodges, who must be taken to represent Mr. Salmon, that the contract in question was a usual and proper contract for the purchase of property such as that described in the advertisement; but having come to the conclusion that there was no deception in the advertisement, I cannot say that the circumstance of the charge to which the property was subject not being ground-rent, was such a fraud as to vitiate the contract. It is true that some of the conditions were harsh, and if the plaintiff's case had been that he had been induced to bind himself to unusual terms, there might have been something in it, but this is not his case.

Considering, then, that what the plaintiff was substantially agreeing for was houses let at sums mentioned, and that he was to take them subject to a payment of 50*l.* a year, I cannot come to the conclusion of the Vice-Chancellor that the jurisdiction of this Court ought to be exercised by rescinding the contract. I think that the bill ought to be dismissed, but that there ought to be no costs, for the defendant misdescribed the property; and this may be a good lesson to those who undertake to give a description of what they sell, and are therefore bound to be accurate. The bill must be dismissed without costs, and without prejudice to any action which the plaintiff may be advised to bring.

1855. November 21, 22, 26. Before the Lord Chancellor Lord CRANWORTH.

Mere declaration of trust by the owner of property in favour of a volunteer is altogether inoperative, and the Court will not interfere in such a case; *aliter* where there has been a change of legal ownership and so a trust constituted.¹ Letters written by a mortgagee to the mortgagor and persons interested under him, containing the expressions, "I now give this gift to become due at my death, unconnected with my will." "I hereby request my executors to cancel the mortgage-deed," &c. "I again direct and promise that my executors shall comply with my former request, that is, to cancel all deeds and papers I may have chargeable on the R. estate:" *Held*, not to operate either as a declaration of trust or as a valid gift.

THIS was an appeal by the defendants Martha Balme and Mary Whitby, from a decree of foreclosure made by the Vice-Chancellor STUART, on the 29th May, 1855. The material facts of the case are succinctly stated by the Lord Chancellor, and are here extracted from his Lordship's judgment.

The bill in this suit was one of foreclosure, by the executors of Mary Bacon. A mortgage in fee of an estate called Rycroft was made to her by Nettleton Balme, in December, 1829, to secure the sum of 2500*l*. Nettleton Balme, the mortgagor, was her first cousin. He died on the 11th September, 1838, having devised his equity of redemption to the defendants Daniel Maude and Jeremiah Nettleton Balme in fee, in trust to sell and divide the proceeds among his three children, that is, the defendants Jeremiah Nettleton Balme, Martha Balme, and Mary Whitby.

On the 30th January, 1841, the defendants J. N. Balme and Martha Balme, as his surety, assigned their interest in the proceeds to arise from the sale of Rycroft to Mary Bacon, to secure a further sum of 2500*l*., that sum having been previously secured upon a mortgage made to her by J. N. Balme on certain portions of the

¹ See *Kekewich v. Manning*, 1 De G., M. & G. 176, and cases in note (1), 188 and notes (1) & (2), 189 n. (1); *Lewin Trusts* (5th Eng. ed.), 56 *et seq.*, *Perry Trusts*, § 98; *Stone v. Hackett*, 12 Gray, 227; *Andrews v. Hobson*, 23 Ala. 219; *Airey v. Hall*, 3 Sm. & Giff. 315. In *Jones v. Lock*, L. R. 1 Ch. Ap. 25, it was held, that a parol declaration of trust in favour of a volunteer may be valid, and may be enforced in equity. See *Stone v. Hackett*, *supra*.

Rycroft estate which belonged to him. Mary Bacon died on the 24th February, 1853, having appointed the * plaintiffs * 44 her executors, who duly proved her will; she also devised to them all real estate vested in her by way of mortgage.

On the 5th May, 1854, the plaintiffs filed the present bill of foreclosure against the devisees of Nettleton Balme, and the persons deriving title under them. The cause was heard on the 29th May last, when the Vice-Chancellor STUART gave the plaintiffs the ordinary decree in a foreclosure suit. Against that decree the defendants Martha Balme and Mrs. Whitby now appealed.

The defence which was relied upon was, that by the effect of certain papers made and signed by Mary Bacon in her lifetime, the title to the money secured on the Rycroft estate had become vested in the defendants Martha Balme and Mary Whitby. The authenticity of the documents was impugned by the plaintiffs in their bill, and endeavoured to be proved by the evidence. The first of these documents was addressed by Mary Bacon to Nettleton Balme, and was written on the second sheet of the letter in the following terms:—

“As agreed with my late sisters, I now give to my cousin Nettleton Balme this gift, to become due at my death unconnected with my will. I hereby request my executors to cancel the mortgage-deed, bonds, notes, and all papers I may have chargeable on Rycroft estate at my death free of all charges, and give to Nettleton Balme, or his daughters or daughter then living, for their own use: their receipt shall be satisfactory, independent of any husband they may have. I further add that this my request shall be a full discharge for my executors.

“ (Signed) MARY BACON, Spring House.
“ December 29, 1836. Private.”

* The second of such documents was in the form of a letter, addressed by Mary Bacon to Martha Balme, and was in the following terms:— * 45

“Spring House, Bradford, December 4, 1840.

“Dear Miss Balme,—Your brother seems very anxious I should change the mortgage upon his property to his interest in the Rycroft estate. From all I hear he cannot have any interest

in that property, but I feel wishful to assist your family for your long continued care and expense of your late brother's orphan children, and also to protect you should you join your brother in his proposed security upon Rycroft. I promise this gift, and direct that my executors shall at my death give to your sister Mary Whitby the sum of 3000*l*. And I also now direct that they shall give the same sum to you, providing your brother has paid his mortgage, but should he fail to meet that engagement, I then direct that 2500*l*., the amount of the mortgage, shall be deducted from your share. And I further add, that you and your sister's receipt alone shall be a sufficient discharge for my executors, independent of any husband either of you may have. I also declare that these my gifts shall be unconnected and independent of my will. I consider you two have suffered great privations from your eldest brother for a many years, and think this arrangement and one of 1836 will place you both in comfortable circumstances at my death. Hoping you will keep this private from your brother, I shall remember him if he pays the interest regularly; he has also been very kind to the orphans.

“ Dear Miss Balme, yours truly,

“ MARY BACON.”

The third of the documents relied upon by the defendants
 * 46 was also in the form of a letter, addressed by * Mary Bacon to the said Martha Balme, and was in the following terms :

“ Spring House, October 30, 1847.

“ Dear Miss Balme,—I hereby acknowledge the receipt of 50*l*., in part of interest due July last. I am sorry to hear you are so unwell; anxiety has much to do with your health. Your not selling Rycroft now may be all for the best, as property near Bradford is much improving in value. I think your brother does not intend to accept my offer to give him the second mortgage-deed for 1000*l*. However, I have made my arrangements accordingly, so that you and your sister will be, as you already know, provided for at my death independent of any will I may have. I promised your father that Rycroft should not be sold, your brother takes advantage of that. I have talked your affairs over with your uncle Abraham very lately; he is a good man, and thinks with me, that you and your sister are great sufferers. You shall have all my

former promises made good, you must present the gifts and papers to my executors. I again direct and promise that my executors shall comply with my former request in 1836, that is, to cancel all deeds and papers I may have chargeable on Rycroft estate at my death, also make good all other gifts for your sister and yourself, the second mortgage-deed for your own use. I request all the before-named gifts to be transferred to you and your sister Mrs. Whitby. I wish you two to have perfect control in selling Rycroft as you think best. I have given up all expectation from your brother, and take this plan to save expense and prevent confusion. You and your sister's receipt alone shall be satisfactory. I hope you will soon sell the minerals so as to improve your income, at its present value you can only receive the same amount of rent as your sister from the estate. I think *these proposals * 47 will relieve your mind. If you had not joined your brother I should have transferred something in the funds for your present use, considering your circumstances to be very limited. Hoping to hear you are better, and trust you will be more fortunate in future,

“ Dear Miss Balme, yours sincerely,

“ MARY BACON.”

Mary Bacon died on the 24th February, 1853, and her will was duly proved by her executors. The mortgage debts of 2500*l.* each, together with a large arrear of interest, remained due and owing to her estate. Her executors filed the bill, praying an account and payment or foreclosure. The plaintiffs went into evidence at considerable length, to show that the three documents which were relied upon by the defendants were not genuine, but the evidence adduced failed to satisfy the Vice-Chancellor that the documents in question were not authentic. The Vice-Chancellor, however, being of opinion that they constituted no defence to the suit, made the usual decree for foreclosure, from which decree the defendants Martha Balme and Mary Whitby now appealed to the Lord Chancellor.

Mr. Malins and *Mr. Pearson*, for the plaintiffs, in support of the Vice-Chancellor's decree. — We submit, first, that the documents set up by the defendants are forgeries ; secondly, if genuine, they are such as cannot be available by way of defence in this suit,

but must be established by the defendants in a suit for the purpose before they can be available. Thirdly, the documents are testamentary, and have been revoked by the will and codicils of * 48 the testatrix: *Habergham v. Vincent*, (a) *Ousley v. Carroll*, cited in *Ward v. Turner*, (b) *Walsh v. Gladstone*; (c) and if not revoked, being testamentary, they cannot be looked at by this Court until proved in the Ecclesiastical Court. Fourthly, if not testamentary, they must be regarded as contracts to give money not supported by any consideration and simply void. *Ellison v. Ellison*, (d) *Jefferys v. Jefferys*. (e) They also referred to *Cooke v. Lamotte*. (g)

Mr. Bagshawe, Jun., for Charles Balme and the legatees, supported the decree of the Vice-Chancellor, and referred to *Kekewich v. Manning* (h) and *Boyle v. Hughes*. (i)

Mr. Bacon and *Mr. Fleming*, for the defendants the appellants. — We do not allege that the documents are testamentary; what we contend is, that they amount to a valid declaration of trust, no formality being necessary to give it efficacy. * *Dale v. Hamilton*, (k) *Tierney v. Wood*. (l) As to the transaction being voluntary, we admit that, but it is to be observed, that we are not here seeking to enforce an imperfect instrument, but simply resisting the enforcement of an equitable title by foreclosure, against which we ask only to apply an equitable defence. The plaintiffs must be assumed to admit that the documents are a valid defence if genuine. It is true, that, in *Kekewich v. Manning*, (h) there was a deed; but if we can show that a deed was not necessary, that case is exactly applicable, for, as there observed by the Lord Justice KNIGHT BRUCE, “In equity it stands scarcely or not at all on a better footing than if it were contained in an instrument * 49 unsealed.” * On similar principles Lord ELDON in *Ex parte Pye*, (m) with reference to the question whether a power of attorney amounted to a declaration of trust, observes, “It is clear

(a) 2 Ves. Jr. 204.

(b) 2 Ves. 440.

(c) 1 Phil. 294.

(d) 6 Ves. 656.

(e) Cr. & P. 138.

(g) 15 Beav. 234.

(h) 1 De G., M. & G. 176; see p. 188.

(i) 2 Sm. & Gif. 18.

(k) 2 Phil. 275.

(l) 19 Beav. 330.

(m) 18 Ves. 140; see p. 149.

that this Court will not assist a volunteer, yet if the act is completed, though voluntary, the Court will act upon it." The authority of *Fletcher v. Fletcher* (a) shows, that unless a deed were absolutely necessary we have a clear equity, because in that case the deed was not communicated to the *cestui que trust*; and if a party has, according to Lord ELDON in *Ex parte Pye*, (b) declared himself to be the trustee of stock, he has accepted the trust, the gift is complete, and it becomes the property of the *cestui que trust* without more. The mere necessity for cancelling the deed is not such an obligation as will render the instrument testamentary, and being an instrument in writing it satisfies the Statute of Frauds. As to the will of 1847 superseding the previous instruments, the answer is, that it was not competent for the testatrix to have annulled them by any will. We do not contend that the documents were such as amounted to a contract to pay money; and as to their being of a parol nature, and incapable of releasing the prior covenant, that is negatived by *Kekewich v. Manning*. (c) The Vice-Chancellor said that they amounted only to a promise, and not a gift, but the words "as agreed I now give" are amply sufficient to show a present gift to be paid at the death of the donor, and even if revocable would be valid. *Uniacke v. Giles*. (d) There is no difference in principle between a covenant that executors shall pay a particular sum and a direction that executors shall do a particular act. The allegation as to the forgery of the documents being entirely unsupported by evidence, the plaintiffs' * costs of this suit ought clearly to be paid by them, at least * 50 so far as relates to the evidence of forgery. As to the necessity for our establishing the validity of the documents in a cross suit instituted for that purpose, it is obviously unnecessary, inasmuch as nothing is put in issue in the answer which is not raised in the bill.

Mr. Malins, in reply. — All the documents are testamentary, but that of 1840 is clearly testamentary, and ought to have been proved.

[THE LORD CHANCELLOR. — There is no gift except in the direction to the executors to pay.]

(a) 4 Hare, 67.

(b) 18 Ves. 140; see p. 149.

(c) 1 De G., M. & G. 176.

(d) 2 Moll. 257; see p. 268.

The receipts were to be given "to my executors." This case is clearly distinguishable from *Fletcher v. Fletcher*, (a) inasmuch as in that case there was a covenant upon which an action might have been brought. The case also of *Dale v. Hamilton* (b) has no application, because there there was a valuable consideration; but in the absence of such, if the gift is not complete by reason of the non-performance of any of the requisites to perfect the gift, equity will not assist the volunteer. *Edwards v. Jones*. (c)

November 26.

The Lord Chancellor, after recapitulating the facts as above stated, proceeded as follows: The decree of foreclosure would be as of course, unless some valid defence is set up. In the present instance, the defence which has been relied upon is, that by the effect of certain papers, made and signed by Mary Bacon in her lifetime, the title to the money secured upon the Rycroft estate has become vested in the defendants, Martha Balme and Mary

Whitby. The question for me to determine is, whether that
 * 51 is made out. * The three papers were made at intervals of time considerably distant from one another. The first of such documents was in the form of a letter addressed by Mary Bacon to Nettleton Balme, and was dated Spring House, December 29, 1836; and was written on the second sheet of the letter addressed to Nettleton Balme, and was as follows: [His Lordship here read that document, *ante*, page 44, and proceeded.] The plaintiffs' case is, that all the three papers are not genuine. In my opinion, that case entirely fails on the evidence. The real dispute is as to the effect of those documents.

In the first place, then, as to the paper of the 29th December, 1836. In order to sustain the case of the defendants, they must make out that this is a valid declaration of trust. But I do not think it is a declaration of trust at all; and, if it were a declaration of trust, it would be invalid as being voluntary. It is not a declaration of trust at all, for it was intended merely to be a direction to the executors. Though she speaks of a gift, there is in fact no gift, except the direction to the executors. It was obviously revocable. The argument of the defendants must go the length that Nettleton Balme and Mrs. Bacon could not together have dis-

(a) 4 Hare, 67.

(b) 2 Phil. 275.

(c) 1 Myl. & Cr. 226.

posed of the estate, and that, if he had paid off the mortgage, Mrs. Bacon was bound to invest the money on securities to be held on trust. Even if it were a declaration of trust, it would be invalid for want of consideration. Mere declaration of trust by the owner of property, in favour of a volunteer, is inoperative, and this Court will not interfere in such a case.¹ The case is different where there has been a change of legal ownership, and so a trust has been constituted; and then the Court will inquire what the trusts are. But there is no authority in favour of the defendants' contention. *In *Kekewich v. Manning*, (a) the * 52 Lord Justice KNIGHT BRUCE and I thought that every thing had been done which the *cestui que trust* could be reasonably expected to do. She had no power to compel her co-trustees to concur in transferring the fund to new trustees. She was herself one of the trustees and also *cestui que trust* in remainder, and with such a title she executed a deed assigning the fund to new trustees on trusts which, in the event, gave the property to volunteers.

Here there was no embarrassments arising from the existence of trustees, or of any one having a prior title to that of Mrs. Bacon herself. If she had wished (which I do not think she did) to make an irrevocable settlement, she might have transferred the mortgage to a trustee on any trusts she might approve of, voluntary or not voluntary. This she has not done. The document is at most a mere gift, to take effect through her executors after her death, and it is voluntary and revocable.² The mortgage would clearly have been assets for the payment of her debts.

This brings me to the consideration of the second paper, that of 4th December, 1840, which was the letter from Mrs. Bacon to

(a) 1 De G., M. & G. 176.

¹ In *Jones v. Lock*, L. R. 1 Ch. Ap. 28, Lord CRANWORTH, in the course of the argument, said that the dictum attributed to him in *Scales v. Maude*, 6 De G., M. & G. 51, must have had reference to the special circumstances of the case, and though his Lordship considered the decision in that case to be right, the dictum was clearly wrong as a general statement of the law. There could be no doubt that there might be a valid declaration of trust in favor of a volunteer. See *Perry Trusts*, § 98 *et seq.*

² In *Stone v. Hackett*, 12 Gray, 232, Mr. Justice BIGELOW said: "A power of revocation is perfectly consistent with the creation of a valid trust. It does not in any degree affect the legal title to the property. That passes to the donee and remains vested for the purposes of the trust, notwithstanding the existence of a right to revoke it."

the defendant Martha Balme, dated 4th December, 1840. [His Lordship here read the letter, *ante*, page 45, and proceeded.] It cannot be pretended that this is a declaration of trust. The argument was, that it amounted to an engagement by Mrs. Bacon to relinquish the second mortgage in consideration of Martha Balme's concurrence in the transfer of it to her. I think it impossible to put such a construction on it. It is a mere promise that she will give, at her death, 3000*l.* to Mrs. Whitby, and 3000*l.*

* 53 * to Martha Balme, the latter sum to be made up in part by the amount of the second mortgage on Rycroft; and she says she does this partly to protect Martha Balme from the consequences of her joining with her brother in transferring the mortgage, if she should so concur. The whole is evidently mere bounty, or rather a promise of bounty after the death of the person making the promise, to be carried into effect by her executors. To treat this as any answer to the plaintiffs' demand would be to violate all the long-established doctrines as to the invalidity of mere promises of bounty unfulfilled.

With respect to the authority of *Fletcher v. Fletcher*, (a) I do not doubt, as at present advised, the correctness of the principle laid down by Sir JAMES WIGRAM in that case, which is perfectly distinguishable from the present. There the charge was by deed, and constituted a legal claim on the assets of the grantor; but what is sought here is to make available in this Court something which could not be enforced at law.

I strongly incline to think that both these documents are testamentary. It is not, however, necessary to decide that. It is sufficient to say that neither of them can have any validity if not testamentary. If they are testamentary, then they can have no effect unless they are duly proved in the proper Ecclesiastical Court.¹

With regard to the third paper, that of the 30th October, 1847, it is not contended that any benefits are directly given by that instrument. What is said is, that it confirms the view previously taken of the two other documents. I confess that this paper rather confirms me in the opinion that every thing which had been done by the two former instruments was intended to be

* 54 merely * testamentary. [His Lordship here read the third

(a) 4 Hare, 67.

¹ See *per* BIGELOW J., in *Stone v. Hackett*, 12 Gray, 232, 233.

document, dated the 30th October, 1847, *ante*, page 46, and proceeded.] She says she had promised her father that Rycroft should not be sold. If, by the effect of the first paper, she had become a mere trustee of the mortgage, she could not have sold Rycroft without the consent of Mrs. Whitby and Martha Balme, for whom she was trustee. Again, she says, "You shall have all my former promises made good. You must present my gifts and papers to my executors." It is plain she considered that she had made promises, which she thought that, in fairness, she was bound to fulfil: and she points out how this was to be done; *i.e.*, by presenting the documents to the executors, who would comply with her wishes.

On the whole, I think the defendants have failed to establish any defence, and so that the decree of the Vice-Chancellor was right.

If this were an original hearing, probably I should not have given the plaintiffs their costs of disputing the handwriting of Mrs. Bacon to the documents in question. But I cannot vary the decree on a matter so entirely one of discretion; and indeed, though, as I have already stated, I am satisfied that the documents are genuine, yet it must be admitted there is a great deal on the face of one of them at least to excite suspicion.

It is evident that the handwriting has been, to use the expression of the witnesses, painted over; and although, in all probability, it is correctly said that this was done by Mrs. Bacon herself, yet what was so done has certainly given to the papers a strange appearance, not unreasonably exciting suspicions of their having been in some manner tampered with. I think, therefore, the appeal must be dismissed with costs.

1855. November 23, 24, 26. Before the Lord Chancellor Lord CRANWORTH.

Under a marriage settlement, the husband and wife had a power of appointing a fund among their children, and in default of appointment, or so far as it did not extend the fund was to go to the children equally. There were three children of the marriage. An appointment of one-third of the fund was made in favour of one of the children, yet so as not to affect the same power further than to the extent specified, and also, in case of no complete exercise or

execution of the same power or authority as to the share of the fund not affected by the appointment, so as not to prejudice or affect the right or contingent interests of the appointee under the proviso for accruer, in case of the death of any or either of the other children, in such manner as specified in the settlement, and notwithstanding that in case of no complete appointment the then "appointment was intended to be made in lieu of all claims and demands" of the appointee to or for any original or principal share of the fund: *Held*, that the appointors must be taken by necessary implication to have appointed the other two-thirds to their two other children, and that the appointee was not entitled to share in such two-thirds.

By an indenture of settlement made on the marriage of Roger Baskett, since deceased, with Sarah Foster, his late wife, also since deceased, dated the 10th July, 1804, it was declared that the trustees therein named, and the survivors and survivor of them, his executors and administrators, should stand possessed of and interested in the sum of 9009*l.* 3*s.* 8*d.*, 3*l.* per cent reduced annuities, then standing in their names, in trust, after the said intended marriage, to pay the income thereof to the said Roger Baskett for life, and after his death to the said Sarah Foster for her life, and after the death of the survivor of them, upon trust, for all and every or any such one or more of the children of the said intended marriage, or of all or any of the issue of any such children, or part for all or any of such children, and the residue for all or any of such issue, to be payable or transferable at such time or times, and, if more than one, in such parts, shares, and proportions, manner, and form as they the said Roger Baskett and Sarah his wife at any time or times, and as often as they should think fit during their joint lives, by any deed or writing, deeds or writ-

ings, revocable or irrevocable, to be by them sealed and delivered in the * presence of and attested by two or more witnesses, should limit, declare, or appoint, and for want of such limitation, declaration, or appointment, or in case any such should be made, when and as the estates and interests to be thereby limited, declared, or appointed, should respectively end and determine; and as to so much and such part or parts of the said 9009*l.* 3*s.* 8*d.*, 3*l.* per cent annuities, if any, whereof there should not be any such limitation, declaration, or appointment, in trust for the only child, or for all and singular the children of the said Roger Baskett, on the body of the said Sarah Foster to be begotten, to be divided equally between or amongst them, if more than one, share and share alike, for his, her, or their portion or portions; and that

the portion or portions of such of them as should be a daughter or daughters should be paid or transferred at her or their age or ages of twenty-one years, or day or days of marriage, which should first happen, and the portion or portions of such of them as should be a son or sons should be paid or transferred at his or their age or ages of twenty-one years, unless such respective ages or times of payment should happen during the joint lives of the said Roger Baskett and Sarah his wife, or the life of the survivor, in which case such portion or portions should be a vested interest or vested interests in such son or sons, daughter or daughters respectively, and transmissible to his, her, or their representatives, at and from such age or ages, times or respective times, as aforesaid, but the payment or transfer thereof should be postponed until the decease of such survivor; with limitations over, in case any daughter should die under the age of twenty-one years without having been married, or any son under that age, to the other children of the marriage, but which events did not happen; with further provision in case there should be no child of the said then intended marriage, * and for the appointment of new * 57 trustees of the settlement.

The settlement did not contain any hotchpot clause.

The marriage between Roger Baskett and Sarah Foster was duly solemnized, and there was issue of such marriage three daughters and no more: namely, Sarah, afterwards the wife of the defendant Joshua Cautley, and since deceased; the defendant Etheldred Rickley, and Elizabeth, afterwards the wife of William Thomas Clarke, who, together with William Thomas Clarke, was also dead.

By a deed-poll under the hands and seals of Roger Baskett and Sarah, his wife, bearing date the 6th June, 1837, after reciting the settlement of the 10th July, 1804, and that Roger Baskett and Sarah his wife had issue three daughters, namely, Sarah, Etheldred, and Elizabeth, who were all then living, it was declared that in consideration of the natural love and affection which the said Roger Baskett and Sarah his wife had toward their daughter the said Sarah Baskett, and in pursuance and part execution of the power for that purpose given to them in and by the indenture of settlement, they the said Roger Baskett and Sarah his wife did yet so nevertheless as not to prejudice or affect the same power or authority of appointment, further than to the extent thereafter

specified, and also in case of no complete exercise or execution of the same power or authority as to the share or shares of the trust moneys and premises not affected by the deed-poll, so as not to prejudice or affect the right or contingent interest of their daughter Sarah Baskett under the proviso for accruer and survivorship of the share in the trust moneys and premises in

* 58 case of the * death of any or either of their other children, in such manner as was specified and contained in the indenture of settlement, and notwithstanding that in case of no complete appointment, the then present appointment was intended to be made in lieu of all claims and demands of their daughter Sarah Baskett, to or for her original or principal share or interest in the same trust moneys and premises jointly and each of them did irrevocably limit, declare, and appoint that the said John Foster and James Torkington, or the survivor of them, his executors or administrators, or other such new trustees or trustee as should be appointed under or by virtue of the before-recited indenture of settlement, should upon and immediately after the decease of the survivor of them the said Roger Baskett and Sarah his wife, pay, assign, and transfer one equal and full third part or share of and in the said sum of 9009*l.* 3*s.* 8*d.*, 3*l.* per cent reduced annuities, so comprised in the thereinbefore recited indenture of settlement, unto their said daughter Sarah Baskett, her executors, administrators, and assigns, as and for her original share and interest in the same trust moneys and premises, and be and for her own use absolutely.

By the settlement bearing date the 7th June, 1837, and made on the marriage of Sarah Baskett with Joshua Cautley, to which settlement her father Roger Baskett was a party, all the full third part, portion, or interest of her the said Sarah Baskett the daughter in the said sum of 9009*l.* 3*s.* 8*d.*, 3*l.* per cent reduced annuities, settled under or by virtue of the indenture of settlement of the 10th July, 1804, and then vested in the trustees under the said settlement of 1804, which said share and interest was appointed to her under the said deed-poll, and all other the share or interest, shares or interests, sum or sums of money (if any) which

* 59 might * accrue or devolve to her the said Sarah Baskett the daughter under or by virtue of the same indenture of settlement, or otherwise were vested in trustees for the benefit of herself and her husband for life, with remainder to their children.

Roger Baskett, by his will, dated August 23, 1838, gave all his personal estate to trustees upon the trusts therein mentioned. The will contained the following proviso: provided also that he the said testator thereby directed and declared that the bequest or declaration of trust thereinbefore made in favour of his the said testator's said daughter Sarah and her children, was made upon condition that his said daughter Sarah should bring into hotchpot the sum of 1000*l.*, advanced by him the said testator to her upon her marriage, and also that she his said daughter should renounce and give up all claim to any share in the sum of 9009*l.* 3*s.* 8*d.*, 3*l.* per cent reduced annuities, settled under his the said testator's settlement upon his marriage with his said wife, beyond the one-third part or share of the same sum of 9009*l.* 3*s.* 8*d.* appointed to his said daughter Sarah upon her said marriage; and in case his said daughter should fail or neglect to bring into hotchpot the said sum of 1000*l.*, or to release all such claim as therein mentioned, then he directed and declared that the sum of 3000*l.* should be deducted from the one-third share of the produce of his the said testator's said real and personal estate thereinbefore directed to be set apart for his said daughter Sarah and her children, and should be added in equal moieties to the one-third shares thereinbefore directed to be set apart for his said other daughters respectively, and be held as part of their said intended shares respectively as therein mentioned.

The testator died on the 20th March, 1841, having never exercised the powers of appointment reserved to * him and * 60 his wife jointly, except by the deed-poll of June, 1837, as to one-third part of the trust funds. His daughter Etheldred married the defendant Pinckney; and his daughter Elizabeth married W. T. Clarke, and by their marriage settlement she had the power of appointing her expectant share in the 9009*l.* under the settlement of 1804, and she, in pursuance of that power, by her will gave all her real and personal estate over which she had a power of appointing to her husband and died. The defendant W. Scarborough claimed under the will of W. T. Clarke, who survived his wife, and died on the 11th June, 1846.

The Vice-Chancellor STUART having held that Sarah Cautley became entitled under the settlement of 1804 to one-third part of the unappointed residue of and in the trust funds, in addition to the one-third part appointed to her by the deed-poll of June,

1837, the defendant W. Scarborough now appealed to the Lord Chancellor.

Mr. Lloyd and *Mr. Shapter*, for W. Scarborough, in support of the appeal. — Although in the deed of appointment of June, 1837, there is an express negation of the right of Mrs. Cautley to participate in the unappointed residue, the Vice-Chancellor has nevertheless declared that she had such a right. We submit that under such circumstances, the appointment was in the nature of a conditional appointment, and amounted to or at least supplied the defect of a hotchpot clause in the original settlement, and under such circumstances there can be no implication, as in the case of an heir-at-law. The appointment which was made “in lieu of all claims and demands” amounted to a contract on the part of the appointee to bring her share into hotchpot if she should seek to participate in the residue, which is incorrectly assumed to

* 61 be an unappointed * fund. We rely on the authority of *Simpson v. Paul*, (a) recognized and approved by Sir W. WOOD in *Lee v. Head*. (b) The case of *Wilson v. Piggott* (c) may at first sight be thought opposed to our contention, because the result of that decision was to vest the unappointed residue in all the children equally, though an appointment had been exercised in favour of one of them “as her share;” but it is to be observed, as Lord ALVANLEY there stated, that the appointor had not in express words said that the part appointed was to be taken in lieu of her share, but “as her share,” the necessary inference from which is that in the present case the words are sufficient to exclude the respondent from participating in the residue. In the case of *Fortescue v. Gregor*, (d) there being a power of appointment to be exercised among three persons, and the power being executed in favour of one, with a recital that the donee of the power was desirous that the fund should be equally divided, it was held to be sufficient to exclude the appointee from participating in the unappointed residue. In the case of *Folkes v. Western*, (e) an advancement was held to be a satisfaction. So in *Alloway v. Alloway* (g) Lord ST. LEONARDS said that if there had appeared in that case an intention expressed or implied at the

(a) 2 Eden, 34.

(b) 1 K. & J. 620.

(c) 2 Ves. Jr. 351.

(d) 5 Ves. 553.

(e) 9 Ves. 456.

(g) 4 Dr. & War. 386; see p. 391.

cited, in addition to the other cases above mentioned, *Attorney-General v. Godard*, (a) *Cawood v. Thompson*. (b)

* *Mr. Rolt* replied. — He admitted that the primary mean- * 82
ing of the word “endowment” was that attributed to it by
the respondents, but contended that the terms of the will in this
case showed that the testatrix used it in its more extended sense,
and pointed to the building of new churches, and not merely to the
support of existing churches. He submitted that unless the pur-
chase of land was in terms excluded by the testator, and where the
accomplishment of the testator’s desires could not be carried out
without the purchase of land, the result of the authorities was to
show that the gift was void as being within the statute. *Attorney-
General v. Williams*. (c)

THE LORD CHANCELLOR. — I will dispose of this case finally in a
few days. With respect to what is called the second point, namely,
the question whether the canal shares and the stock belonging to
the Grand Junction Canal Company, &c., are interests in land with-
in the meaning of the Statute 9 Geo. 2, c. 36, I must look minutely
into the finding of the Master, as, though all the items may appar-
ently be nearly the same, the actual determination of the question
may turn materially on the special finding as to each. I may, how-
ever, remark, in reference to an observation that has been made
that the authorities relied on to show that these are not interests
in land are not binding upon me, that I think it would be very
dangerous to act upon such a doctrine, for if there has been a
course of decision, though short of the ultimate Court of appeal,
which has regulated the practice for a long series of years, it would
be most unsafe to hold that that is not to be treated as a very
strong authority to show that the law is as it has been so
laid down. If the * argument that has been used was * 83
allowed to prevail, it would come to this, that I ought to
allow nothing to guide me but what has been decided in the House
of Lords, and that is a doctrine which I could not for a moment
encourage. If I find that there is a strong current of authorities
to the effect that these are not interests in land, I shall be inclined
to adhere to that course of decision, though at the same time, if I

(a) T. & R. 348.

(b) 1 Sm. & G. 409.

(c) 2 Cox, 387.

come to the opinion that it is wrong, I shall not hesitate to say so.

With regard to the other point in the case, I shall not absolutely bind myself now with respect to it, but I cannot agree with what has been urged, that endowing any thing can by possibility mean building it. There might no doubt be a case in which, where the will contained a direction to endow, you would say that to purchase or to build first must be inferred, but that inference would be drawn from the context of the will. The word "endow" means giving a benefit to some existing thing; it supposes something to exist either at the time when the gift is made, or when the endowment is to take place; it has no reference at all to building or purchasing.

It was also contended that the direction to endow was not confined to the endowment of existing churches and chapels, but was a trust which might be well performed by endowing churches and chapels hereafter to come *in esse*, and it was said that this is against the Statute of Mortmain; and the cases of *The Attorney-General v. Davies*, (a) *Mather v. Scott*, (b) and *Trye v. The Corporation of Gloucester*, (c) were relied on as bearing out this

* 84 proposition. I do not, however, think * that they do bear it out. I agree that it is absurd in these cases to talk about an evasion of the statute, because any one has a right to evade a statute if his meaning is to place himself in such a situation as not to come within its purview. Applying this remark to the Statute of Mortmain, the sole question is whether a testator has or has not brought himself within its provisions. In the case of *The Attorney-General v. Davies*, the testator had brought himself within the statute, because he gave the residue of his estate to a corporation, provided they would furnish land to build certain houses upon it; and in *Mather v. Scott* it was clear that the trustees were either to purchase land or to build on land already obtained. These cases do not appear to me to govern the present, where the direction to the trustees really is to search out existing chapels in populous districts where there are no endowments, or insufficient endowments, and to apply the fund in making endowments or improving existing endowments; and I do not think that the gift is bad, because it may be applied not only to chapels that already exist, but also to chapels that may come *in esse* afterwards.

(a) 9 Ves. 535.

(b) 2 Keen, 172.

(c) 14 Beav. 173.

I will, however, look through the authorities to see if there is any thing that shakes my present opinion, and I will state the result in a few days.

December 3.

THE LORD CHANCELLOR. — The question in this case arises on the will of a lady of the name of Jane Cook, who died in the year 1851, her will being dated on the 5th June, 1850. By it she gave to her executors all her personal estate, and large legacies to a great number of charities; and then at the * end of the * 85 will she says, “ And as to the residue of my personal estate which shall not be otherwise disposed of by me, I direct my said executors as opportunity may offer to apply such part or parts thereof as by law may be legally applied to such purposes in the endowment of district churches or chapels in populous parishes in order that the poor may have the gospel preached to them in this country. And I wish a preference given to those parishes, the churches of which are under the patronage of the trustees of my late friend, the Reverend Charles Simeon and other similar trusts,” and then she appoints executors. The question raised was, whether this gift was good or not; and its validity was objected to upon two grounds, first, that the endowment of district churches and chapels was not a legitimate object, and, secondly, that if it was, still the gift was either wholly or to a great extent void by reason of the residue consisting in a great measure of shares in certain incorporated canal and gas and other companies.

The first question therefore is, is the object to which the property is directed to be applied, such as to make the bequest void. This was the only question really argued by *Mr. Rolt*, and, as far as I can see by the report, the only question that was raised before Vice-Chancellor Wood, by whom the case was decided; and upon this first question, what I have to decide is, whether I concur with the Vice-Chancellor. I have no hesitation in saying that I do. The current of modern decision has been consistent with what Lord ELDON describes as the common sense of the subject; namely, that a direction to build, without indicating a site, naturally implies a direction to purchase a site. This is, in truth, a mere question of construction of the particular will; and what must be decided is, whether there is here a direction, express or implied, to build, and therefore, by what * Lord ELDON calls a * 86 necessary or natural consequence, a direction to purchase a

site for a chapel or chapels. I think that is not a legitimate construction of the words of this will.

The cases which go the nearest to support the argument of the plaintiffs against the validity of the gift are *The Attorney-General v. Hodgson* (a) and *Longstaff v. Rennison*. (b) The gift in the first of these cases was a gift for the establishment of a receptacle for twenty-seven poor old men, and Sir LANCELOT SHADWELL held that this necessarily implied a direction to acquire real estate. It had been observed in argument, and contended before him, that that was not a necessary consequence, for there was a place called the Sailors' Home, on the river that might be made a receptacle without purchasing land. I think, however, that the Vice-Chancellor very reasonably held that, in the absence of any thing pointing to such a mode of providing a receptacle, it could not have been what the testator intended to provide for the poor men, that he necessarily meant the providing a house; and the construction his Honor put on the gift was that it was in truth a direction to build or purchase a house, and so was void under the statute. In the other case, that of *Longstaff v. Rennison*, the testatrix directed her trustees to apply the residue of her trust estate towards establishing a school in connection with the Baptist Chapel at North Shields, and to pay the same to the treasurer of such school now or hereafter to be built; and the Vice-Chancellor KINDERSLEY decided against the validity of the bequest, considering that the testatrix clearly contemplated the building of a school by means of her bequest, and if building, then, according to the prior

* 87 authorities, procuring a site; it was therefore a * direction to apply the personal estate in the purchase of land.

The cases thus referred to cannot, however, govern the present, where the language is different; and certainly it does not, according to my construction of it, point either to the acquiring real estate, or even to the building on land already devoted to charitable objects. By the endowment of a school, an hospital, or a chapel, is commonly understood, not the building or purchasing a site for a school, an hospital, or a chapel, but the providing of a fixed revenue for the support of those institutions. That Sir WILLIAM GRANT considered endowment to mean something different from building or purchasing the thing to be endowed is obvious

(a) 15 Sim. 146.

(b) 1 Drew. 28.

from what he said in *Chapman v. Brown*: (a) his words are, "Lord HARDWICKE, in *Vaughan v. Farrer* (2 Ves. 182), and *Gastril v. Baker*, held, that to erect does not necessarily imply to build, much less a purchase of ground for building; he held it might mean merely an endowment." Lord HARDWICKE was referring to the language of charters, "*erigimus*," which is the common word used where foundations are established. Whether a similar construction of such words would be adopted now, it is not necessary to say, though I rather think not, from what fell from Lord ELDON in the case of *The Attorney-General v. Parsons*. (b) That, however, is immaterial. I have referred to the passage merely to show that Sir WILLIAM GRANT seems to reason *a fortiori* that the word "endowment" clearly would not mean to purchase or build: in truth, the only legitimate guide is the language of the statute, unless where that language has already received a judicial construction. The statute (9 Geo. 2, c. 36), in the first section, says that * no money or other personal estate to be laid * 88 out or disposed of in the purchase of land shall be given to charitable uses except in the mode there provided; and the third section, in rather more extensive language to which I will presently refer, makes void any gift that is not carried into effect in the mode pointed out in the first. The present is not the case of money to be laid out in the purchase of lands, which means money directed to be so laid out, that is, which must be so laid out; the only direction expressed or implied is to make it available as a permanent fund for the minister of the chapel.

It was then contended that the gift was void, as being an intended benefit for chapels hereafter to be built, and so that an inducement is held out to bring land into mortmain; and the language of the present Master of the Rolls in *Trye v. The Corporation of Gloucester* (c) was relied on, where his Honor is reported to have said, "A bequest is void which tends directly to bring fresh lands into mortmain." The decisions on this subject are very ably reviewed in that case, but before I give unqualified assent to the proposition so laid down, I must know what is meant by tending to bring land into mortmain. Nothing is avoided by the statute which cannot by reasonable construction be said to be either a bequest of lands or hereditaments or of some interest

(a) 6 Ves. 404; see p. 409.

(c) 14 Beav. 173; see p. 196.

(b) 8 Ves. 186; see p. 191.

therein, or a bequest of money to be laid out or directed to be laid out in the purchase of lands or hereditaments or some interest therein. In *The Attorney-General v. Davies* the bequest was held bad, because it was in substance a direction to purchase: "you give your land to me, I will give my money to you." I like much better

using the expression that it is in substance a direction to do

* 89 * that which the Act forbids, than saying it is an evasion of the Act, because I never understand what is meant by evading an Act of Parliament. Either you are within the Act or you are not; if you are not within it, you are right; if you are within it, the course is clear, and it cannot be said that you are not within it because the very words of the Act may not have been violated. In the case of *The Attorney-General v. Davies* the Court held that there was substantially a direction to purchase, because there was a gift of money on condition that other persons would give the land; and in *Mather v. Scott (a)* there was a direction to build, and, though the testator looked forward to the probability of land being provided by others, yet there was no prohibition to purchase if land was not so provided, and therefore it was held that there was in truth a direction to purchase.

The question, however, whether a bequest for the support of a chapel to be hereafter built by others would be good is not raised here, for I am clear that existing chapels were contemplated, either with others or exclusively of others; and supposing it to be with others (if it were exclusively of others, *cadet questio*), and a direction to endow chapels hereafter to be built was bad, still where a testator indicates two objects to be selected at the discretion of his executors or trustees, one lawful, the other unlawful, the Court will support the gift in the lawful manner.¹ That was decided by Lord HARDWICKE in *Sorresby v. Hollins, (b)* and I cannot find, in support of what was suggested at the bar, that the propriety of that decision has been questioned. On the contrary, Lord ALVAN-

LEY, in the case of *Attorney-General v. Whitchurch, (c)* expressly approves of * it, and says that "where the testator has pointed out two modes, the one consistent with the statute, the other inconsistent with it, the Court will adopt that which

(a) 2 Keen, 172. (b) 9 Mod. 221. (c) 3 Ves. 141; see p. 144.

¹ See *Jackson v. Phillips*, 14 Allen, 557; *Philpott v. St. George's Hospital*, 6 H. L. Cas. 338; *The Mayor, Aldermen, and Burgesses of Feversham v. Ryder*, 5 De G., M. & G. 350 and n. (1).

is legal, and will carry it into effect." I think, therefore, that on all these grounds which I have stated, the Vice-Chancellor was quite right in holding that the gift of residue to be employed in the endowment of chapels was not a gift voided by the statute.

This brings me to the other question, which was not apparently argued before Vice-Chancellor Wood, but which was argued at great length here. It was said; secondly, that whatever be understood by the word "endowment," still the bequest is void at all events as to a large portion of the residue, by reason of the residue consisting of various classes of personal estate which partake of the nature of realty. There were bank stock, Oxford Canal shares, Grand Junction Canal shares, Grand Junction preferential stock, Grand Union Canal shares, Grand Junction Water-works shares, cash due for purchase of shares and interest in the Ulverstone Canal navigation, Oxford Gas shares, and arrears of rent; and it was said that all these partook of the nature of realty.

Here again our real guide must be the language of the statute. The statute says, in the first section, that no lands or hereditaments, corporeal or incorporeal, nor any money or other personal estate to be laid out or disposed of in the purchase of lands or hereditaments, shall be settled to charitable uses, save as therein provided; and then the third section enacts, that all gifts of any lands or hereditaments, or of any estate or interest therein, or of any charge or incumbrance affecting the same, or of any money to be laid out in the purchase of lands or * heredita- * 91 ments, or of any interest therein, or of any charge or incumbrance affecting the same, save as by the said Act is directed, shall be void.

I have already given my reasons for concurring with the Vice-Chancellor in thinking that a gift of personal estate to be employed in the endowment of chapels is not void by reason of its being a gift of personal estate to be laid out or disposed of in the purchase of land. The only remaining question therefore is whether any of the items of which, according to the Master's report, the residue consists, come within the description in the statute of an estate or interest in lands or hereditaments, corporeal or incorporeal, or of a charge or incumbrance affecting the same. It has long been settled that money secured by a mortgage of land is land within the meaning of the statute, and on very intelligible grounds, for a gift of money so secured enables the person to whom it is given to

take possession of the land and to keep it, unless some third person thinks fit to redeem. So as to money charged on land, if the money is not paid there would be a right eventually to compel a sale of the land, and the gift of the money charged would therefore be in effect a gift of the land. Indeed, as to mortgages and charges, even if there was a difficulty in holding them to be lands or hereditaments within the first section, yet the gift of such property is expressly and in terms struck at by the third section, so that the decisions on that head are clearly in strict consonance with the statute. But the question now for decision is as to shares in incorporated companies. In these cases there is always of necessity some land vested in the company, in the concerns of which the shareholder is interested, and what I have to say is whether a share in such a company is an estate or interest in land. These words, estate or interest in land, are words of

* 92 a very extensive *import, and it is not matter of surprise

that from their vague generality they have given rise to some contrariety of decision. I cannot disguise from myself that, if the point were now to be decided for the first time, there are (so at least it seems to me) forcible arguments in favor of the proposition that shares of this description are interests in land. The share derives in many cases its chief, if not its only, value from the use of land. In the case of incorporated companies, if all the shares should become concentrated in one shareholder (I put an extreme case, certainly, though not an impossible one), that shareholder would at once become absolute owner of the whole property of the company, including the land: why, then, it may be asked, while he is the owner of some only of the shares, is he not the owner of a proportional part of it? On the other hand, every one must feel that, in contending that such shares are interests in land, he is attributing to them a quality which no holder of them ever understands them to possess. Such a conclusion must be arrived at, if at all, by refined reasoning on the legal qualities of such property, not obvious to the ordinary apprehension of the shareholders themselves; and therefore, whatever doubt there might be if the question were *res integra* to be now decided for the first time, the point, I am glad to think, is, as it appears to me, settled by decision. The case of *Myers v. Perigal* (a) had the sanc-

(a) 2 De G., M. & G. 599.

tion first of the Court of Common Pleas, and afterwards of Lord St. LEONARDS in this Court; and that authority seems to me to decide the question of the shares now in dispute. There the company had no charter or Act of Parliament, it was a mere self-constituted joint-stock company having, by the terms of the deed of partnership, liberty to purchase land, and it was found as a fact that the property consisted of (amongst other things) certain freehold and * copyhold hereditaments, and money due on * 93 mortgage of freehold or copyhold or leasehold hereditaments: it was held, after long and able argument in both Courts, that the shares were not interests in land, and therefore not within the 9 Geo. 2, c. 36. By that authority I feel bound, according as it does with a great number of previous cases, and with, as I believe, the general understanding of the community. If that be the law as to the shares in a company not incorporated by charter or Act of Parliament, it surely must be so as to shares in companies which are so incorporated, and where the lands are held by the corporation itself, being a body, in theory at least, distinct from the shareholders of whom the company is composed. I do not feel called on to review or discuss the previous cases: I consider the question to have been settled by *Myers v. Perigal*, from which I have neither the right nor the inclination to depart.

This disposes of the question so far as relates to the bank-stock and all the shares in the various companies enumerated in the report. I say all the shares, for I do not think any distinction can be made in respect to the Grand Junction Water-works shares, by reason of there being no clause in the Act which incorporates the company declaring the shares to be personal estate. The decision in *Myers v. Perigal* establishes that such shares are not an interest in land, and if not an interest in land there is certainly nothing to give them the character of real estate: they are not land, they are not hereditaments, they are not an estate or interest in lands or hereditaments, and so the statute does not apply; and though the Grand Junction Water-works Act does not in terms declare that the shares are to be deemed to be personal estate, yet it declares that the capital, 150,000*l.*, shall be divided into shares of 50*l.* each, to be * vested in the persons subscribing and their * 94 respective executors and administrators proportionately to the sums subscribed: there is, therefore, no real ground of distinction in this case. The money due for the purchase of the Ulver-

stone Canal shares will of course have the same quality as the shares themselves would have had if the testatrix had not sold them, and so will be unaffected by the statute.

This disposes of every thing except the arrears of rent, and these certainly do not constitute an estate or interest in the land. The landlord's estate and interest in such cases is an estate and interest in the reversion; the rent when due is in the nature of fruit fallen, it is severed from the land. The right of distress is not an estate or interest in the land; it is merely a right to enter on the land, and to enforce payment of a debt by seizing the chattels there found: it would be a perversion of language to speak of this as an interest in land: we might as well say that a sheriff's officer entering with a *fi. fa.* or *ca. sa.* has an interest in the land, because he has a right to enter for the purpose of executing his writ.

I am aware that in thus deciding that the shares in these companies are not within the statute, I differ from the Master of the Rolls in *Ware v. Cumberlege*. (a) I do this with the less regret, because, after all, my decision rests quite as much on the necessity of adhering to prior decisions, as on the conviction that those decisions were such as I should have come to. His Honor did not think that *Myers v. Perigal* (b) bound him, relating as that case did to a banking concern. I have already indicated my reasons for thinking that it does govern this case; indeed, that the reasoning there is applicable *a fortiori* to this case. The appeal therefore must be dismissed.

1855. December 6, 7, 8. Before the Lord Chancellor Lord CRANWORTH.

A trader, being in insolvent circumstances, agreed to sell his business and stock in trade in consideration of a money payment, and that the purchaser should, during the joint lives of the trader and his wife, pay the former an annuity equal to one-fourth of the profits, and a contingent annuity to the wife if she

(a) 24 Law J. Ch. 630: since reported, 20 Beav. 503.

(b) 2 De G., M. & G. 599.

survived her husband equal to one-sixth of the profits. The trader having died, and a creditor's suit having been instituted for the administration of his assets: *Held*, that the annuity to the wife was void as against creditors under the Act 13 Eliz. c. 5, and that it was quite competent for the creditor to impeach the annuity without seeking to set aside the whole transaction of which it was a part; and there was a provision in the decree that it was to be without prejudice to any claim of the widow upon the estate of her husband if there should ultimately be a surplus after payment of creditors.¹

THIS was an appeal by the plaintiff Hugh Smith French, from the decree of the Vice-Chancellor STUART, made on the 21st June, 1855, whereby it was ordered that the plaintiff's bill should stand dismissed with costs, so far as the same sought to have it declared that the defendant Augusta French was a trustee for the benefit of the creditors of William French, the testator in the pleadings named, of a certain annuity secured by agreement to the said Augusta French during the joint lives of herself and John Burdett Gibbons after the death of William French.

The bill was filed by Hugh Smith French on behalf of himself and all other the unsatisfied creditors of William French deceased. It stated an agreement that the stock in trade belonging to William French should be valued by a valuer therein named, who should fix the fair price to be paid for the same by John Burdett Gibbons; also that the trade and other fixtures belonging to William French should be valued by a valuer therein named, who should fix a fair price to be paid for the same by John Burdett Gibbons; that John Burdett Gibbons should purchase and take such stock in trade and fixtures at the prices at which the same should be so valued; that the stock in trade and fixtures should be delivered to John Burdett Gibbons, * with possession of the said premises, on, * 96 the day therein mentioned, and the amount of the valuation of the stock in trade to be paid by John Burdett Gibbons to William French on such delivery, and the amount of the valuation of the fixtures to be secured by a bill of exchange to be drawn by William French and accepted by Gibbons, payable at twelve months; that John Burdett Gibbons should have liberty to purchase the book debts of William French upon the terms thereafter stipulated; that in consideration of the premises John Burdett

¹ See *Skarf v. Soulby*, 1 M'N. & G. 364, note (2), and cases cited; *Sugden V. & P.* (14th Eng. ed.) 706, note (1); *Wakefield v. Gibbon*, 1 Giff. 401; *Freeman v. Pope*, L. R. 9 Eq. 206.

Gibbons, his executors or administrators, should, during the joint lives of them, John Burdett Gibbons and William French, pay or cause to be paid to William French an annuity of such amount as thereafter specified, and after the decease of William French, in case he should die before John Burdett Gibbons, then during the joint lives of John Burdett Gibbons and Augusta the then present wife of William French, if she should survive him, unto Augusta French an annuity of the amount thereafter specified, unless such last-mentioned annuity should under the power thereafter contained be released or transferred by William French, it being thereby expressly declared that during the lifetime of William French the right to the annuity payable during the joint lives of John Burdett Gibbons and Augusta French, in case she should survive her said husband, should be vested in him in such a manner that he might be enabled to release and transfer the same as effectually as if the same were an annuity payable *in præsenti* to himself; such annuity to the widow to be for her sole and separate use; that the annuity so to be paid to William French during the joint lives of himself and John Burdett Gibbons should be such yearly sum as should be equal in amount to one equal fourth

* 97 part or share of the net profits of the * business to be carried on by the said John Burdett Gibbons in and upon the said premises, and the annuity so to be payable during the joint lives of the said John Burdett Gibbons and Augusta French to the said Augusta French to be one-sixth part or share of the net profits of the said business; that the said John Burdett Gibbons should forthwith effect two policies of assurance on his own life in the name and for the sole benefit of the said William French, his executors or administrators, one for the sum of 2000*l.*, and the other for the sum of 5000*l.*, and should immediately, on receipt of the said policies from the offices wherein the same should be so effected, deliver the same over to the said William French.

William French died on the 3d January, 1854, having by will bequeathed all his estate and effects to his wife Augusta French, and appointed her sole executrix.

The bill further stated that John Burdett Gibbons did not purchase any of the book debts of William French, and that William French never released the annuity payable to his wife Augusta French during the joint lives of herself and John Burdett Gibbons. The bill alleged that, as against the plaintiff and the other creditors

of William French, the agreement that such an annuity should be paid to his wife was altogether voluntary and fraudulent, and that the said annuity then formed part of the assets of William French, and was applicable to the payment of his debts; that at the date of the agreement of the 19th August, 1852, and for a long time previously, William French was wholly insolvent; that he had on several occasions called together his creditors, and had received from them a letter of license, and that he was when he entered into * the said agreement under great pressure from * 98 his creditors, and in declining health.

The bill prayed for an account of the personal estate and effects of William French, and that it might be declared that the annuity by the said agreement secured to Augusta French during the joint lives of Augusta French and John Burdett Gibbons after the decease of William French was, as against the creditors of William French, voluntary and fraudulent, and that Augusta French was a trustee thereof for the benefit of such creditors; and for a receiver.

By one of the exhibits it appeared that in the negotiation for the sale, the annuity was granted for the "name and good-will" of William French's business, to be collaterally secured by policies of assurance. It also appeared in the evidence that William French was in embarrassed circumstances at the time of the agreement, and it was admitted by Mrs. French that there had been several executions against her husband, and that he had been compelled to pawn some of his stock in trade.

The Vice-Chancellor was of opinion, first, that the settlement of the annuity by William French (notwithstanding his embarrassment) was only a settlement of a small part of his assets, and could not therefore be considered fraudulent as against creditors within the meaning of the Act 13 Elizabeth, c. 5; and, secondly, that the plaintiff in January, 1853, having assented to the assignment of the policy on the behalf of Gibbons as a collateral security for part of his debt due from him to French, such policy forming part of the transaction, and being connected with the circumstances under which the annuity was settled, he the plaintiff had assented * to the transaction, and precluded himself from * 99 objecting to the annuity so settled.

From that decree the plaintiff now appealed to the Lord Chancellor.

Mr. Bacon, Mr. T. H. Terrell; and Mr. Browne, for the plaintiff, in support of the appeal. — The object of the Act 13 Elizabeth, c. 5, being to render void all deeds, &c., made with the “intent to delay, hinder, or defraud creditors,” it is manifest that such portion of the assets of William French the debtor as was attributable to the purchase of the annuity for his widow if she survived him was abstracted from his creditors. In principle there can be no difference between the transaction impeached by this bill, and the purchase by the debtor of a contingent annuity for his wife; in the result the sum paid is just so much abstracted from the funds which belonged to the creditors. With respect to acquiescence, that cannot be imputed to the plaintiff, as there is a clause at the end of the deed reserving all the rights of the creditors. It was also said, that the bill only seeks to set aside part of the deed, but although the bill does not seek to set aside the whole agreement with the defendant Gibbons, nor indeed any part of it, yet we are entitled to a declaration that in the events which have happened, he may be regarded as a trustee to the extent of the annuity for the creditors. It is also to be observed, that the annuity which is impeached was on a double contingency, and the event on which our right has accrued might never have happened.

They referred to the following cases: *Walker v. Burrows*, (a)
 * 100 *Townsend v. Westacott* (b), *In re Magawley's * Trust*, (c)
Skarf v. Soulby, (d) *Strong v. Strong*, (e) *Penhall v. Elwin*, (g) *Goldsmith v. Russell*. (h)

Mr. Swanston and Mr. Dickenson, for the defendant the widow, in support of the Vice-Chancellor's decree. — In order to establish an equity to have the benefit of the statute, the plaintiff must show a fraudulent intent; he must also show that at the time when the property was abstracted it was within the reach of the creditors, but the good-will of the trade undoubtedly was not within the scope of the statute. The plaintiff is clearly guilty of *mala fides* in seeking to set aside any portion of the agreement which he has acted upon and had the benefit of. The cases relied on were cases

(a) 1 Atk. 93.

(b) 2 Beav. 340.

(c) 5 De G. & Sm. 1.

(d) 1 M. & G. 364.

(e) 18 Beav. 408.

(g) 1 Sm. & Gif. 258.

(h) 5 De G., M. & G. 547.

of fraud. In the present case it is admitted that the provisions of the deed (which is not in any manner impeached) were most beneficial for the creditors, and the carrying on of the business in the name of French was one of the stipulations of the agreement with Gibbons, who would have a right either to discontinue the payment of the annuity or to restrain Mrs. French from carrying on the business in her own name.

[LORD CHANCELLOR. — I cannot infer that Mrs. French would be so restrained, or that her husband would have been restrained.]

They referred to *Cadogan v. Kennett*, (a) Story, Eq. Jur. Vol. I. page 290.

Without calling for a reply, the Lord Chancellor said : With all deference to the Vice-Chancellor, I think it quite clear that, assuming what the Vice-Chancellor did as to the estate of William French being in embarrassment, the case is clearly within the statute of Elizabeth. * What was the occasion of that * 101 statute ? It began by reciting that “feoffments, gifts, grants, &c., had been and were devised and contrived of malice, fraud, covin, collusion, or guile to the end, purpose, and intent to delay, hinder, or defraud creditors and others of their just and lawful actions,” &c. What is to be an indication of a person making a settlement whereby he intends to delay creditors ? A person may, although indebted at the time, withdraw some portion of his property, provided there remains enough for the satisfaction of his creditors, but it is an act which *primâ facie* must be made out. It would be absurd to suppose that a person worth 10,000*l.* and settling 1000*l.*, such settlement could be impeached ; but if having 10,000*l.*, and owing that amount, he settles 5000*l.*, it would be clearly a fraud ; and that state of things is not altered by the debtor having a reversionary interest, which of course is equally susceptible of value, nor is the transaction affected by the circumstance of his having property abroad or debts due to him. If the effect is to withdraw any portion of the property, so that there does not remain sufficient to enable creditors to pay themselves, that is in my opinion clearly within the statute.

I must assume that at the date of the agreement the debtor was

(a) Cowper, 432.

not in a condition to pay his creditors in full, and if that were so, any settlement which he could have made, the effect of which would be to prevent his creditors from getting the benefit of what, but for the settlement, they might have got, would, I think, be a transaction clearly within the statute. What has been urged is, that this is not a transaction which it is desired to set aside altogether, and therefore that as the bill does not impeach the sale to Mr. Gibbons, the annuity which was part of the consideration for

the purchase cannot be impeached. Mr. Gibbons had no
 * 102 knowledge * of the state of Mr. French's affairs, therefore the transaction, as far as he is concerned, ought not to be impeached. If the Vice-Chancellor assumed that part only of the transaction could not be impeached, I differ from him. In my opinion the transaction is to be looked at just as if the sale to Mr. Gibbons had been in consideration of so much of the purchase-money to be paid down, and of an annuity which was covenanted to be paid to the wife of the debtor. I consider that annuity so payable to the widow just in the same light as if it was taken and applied to his own purposes, and abstracted from his creditors, and in my opinion it amounts to a voluntary settlement in favour of his wife. It formed clearly a portion of the consideration which, instead of keeping himself for the benefit of his creditors, he chose to keep for the benefit of his wife. The law is clear that such a transaction is fraudulent as against creditors, that is to say, it is an attempt to abstract from creditors what they are entitled to look to for payment of their debts. It appears to me that the sale to Mr. Gibbons was valid, and that the consideration which he paid must be regarded as having been in part settled by the debtor on his wife. It was said that the plaintiff was estopped from filing the bill to impeach the annuity, because he takes the benefit of another provision of the agreement, but in my opinion that has nothing to do with the question. The plaintiff remains a creditor, and as such has a right to impeach that portion of the consideration which has been withdrawn from the creditors generally. Differing as I do from the Vice-Chancellor upon the law of this case, I shall carefully read through the evidence as to the solvency of Mr. French at the time of the transaction, and after all I may be of opinion that Mr. French was not in the condition as regards his estate to bring him within the purview of the statute.

execution of the power, he would have followed the decision in *Fortescue v. Gregor*. (a) On similar principles, where a testator excludes his wife or any one of his next of kin in every possible event, this Court will effectuate such intention. *Davila v. Davila*, (b) *Cleaver v. Spurling*, (c) *Vachell v. Breton*, (d) *Druce v. Denison*, (e) *Gurly v. Gurly*, (g) and even an *heir-at- * 62 law may be excluded by implication. *Hughes v. Evans*. (h) In the cases of *Johnson v. Johnson* (i) and *Wombwell v. Hanrott*, (k) there was an attempt to exclude certain persons without specifically carrying out that intention by giving it over to some one else.

Mr. Malins and *Mr. Dickinson*, for the children of Mrs. Cautley. — The argument of the appellant must assume that the donee of the power by appointing to one child a share necessarily excludes that child from sharing in the residue. The claim of the children, however, is not under the appointment, but paramount to it, as representing their deceased mother; and in truth the only question is whether the appointment of part implies the appointment of the residue, for unless it does the appellant's case must fail. Here it is to be observed, that there was not only no implied appointment of the residue, but an express reservation of the power to appoint it. A mere recital of an intention to exclude certain persons who might be objects of the power is clearly insufficient to exclude them. *Wilson v. Piggott*; (l) *Bristow v. Warde*. (m) The case of *Simpson v. Paul* (n) is not approved by Lord ST. LEONARDS, Sugden on Powers, Vol. I. page 358. The cases of *Lee v. Head* (o) and *Folkes v. Western* (p) have no application, because in each of those cases the parties had expressly released their interests in the estates.

Mr. Elmsley and *Mr. Hallett*, for Mr. and Mrs. Pinckney.

Mr. Wigram and *Mr. Law*, for the trustees.

(a) 5 Ves. 553.

(b) 2 Vern. 724.

(c) 2 P. Wms. 526.

(d) 5 B. P. C. 51, Toml. edit.

(e) 6 Ves. 385.

(g) 8 Cl. & Fin. 743.

(h) 13 Sim. 496.

(i) 4 Beav. 318.

(k) 14 Beav. 143.

(l) 2 Ves. Jr. 351.

(m) 2 Ves. Jr. 336.

(n) 2 Eden, 34.

(o) 1 K. & J. 620.

(p) 9 Ves. 456.

* 63 * [In the course of the argument the appellant's counsel was about to refer to the proviso in the will of Roger Baskett, with a view of showing that by the deed-poll of 1837 there was an intention of excluding Sarah Cautley from participating in the unappointed fund, but the Lord Chancellor held that the will could not be looked at for the purpose of helping the question of construction as to whether, under the deed of 1837, by necessary implication the two-thirds of the fund must be considered as having been appointed to the two other daughters.]

Mr. Lloyd, in reply.

THE LORD CHANCELLOR. — I shall not finally dispose of this case till I look into the authorities. It would be dangerous to throw doubts on general principles, and it is in my opinion far better to have a known rule than to speculate upon what such rule might or ought to be. It has been long settled that where persons have a power to appoint a fund among children, and in default of appointment the fund is to go among all the children equally, *prima facie* it does not exclude the one in whose favour an appointment may have been made from sharing in the unappointed part; nor does the amount of the appointment matter, — the mere circumstance that the portion left unappointed is such as would give to each of the other children a sum equal to what has been appointed is immaterial, though in all probability it might militate against the intention of the appointors. This is the rule established in *Wilson v. Pigott*, (a) and acted on by the Master of the Rolls in *Wombwell v. Hanrott*; (b) and I may here observe that I entirely concur with the Master of the Rolls in his judgment in that case.

* 64 * The question in every case is whether any thing can be discovered to take it out of the rule so established. In the case of *Fortescue v. Gregor*, (c) there being a fund in Court subject to a power of appointment, it was stated on a petition by one of the objects of the power, that the donee of the power was desirous that the fund might be equally divided, and accordingly one-third was transferred to the petitioner. The donee of the power died without any further execution. Although the recital in the petition could not operate as an appointment, and was informal, yet the

(a) 2 Ves. Jr. 351. [Sumner's ed. n. (a).]

(c) 5 Ves. 553.

(b) 14 Beav. 143.

Court gave the two remaining thirds to the two other objects of the power ; and under the circumstances that decision was in my opinion right.

I may altogether disregard the cases of *Folkes v. Western* (a) and *Lee v. Head* (b) — the last was lately before Vice-Chancellor Wood — because they have no application to the present case, and were governed by wholly different considerations. In the case before Vice-Chancellor Wood the question was whether a parent who had advanced one child intended to clear the property of the claim of that child for the benefit of his other children, and a similar question arose in the case of *Folkes v. Western*. (a) They were in fact cases of advancement, and not of appointment.

The sole question before me is whether the words used in the deed of 1804 take the case out of the rule to which I have adverted. They may so take the case out of that rule ; the words are that the said trustees “ shall immediately after the decease of the survivor of them, Roger Baskett and Sarah his wife, pay, assign, and transfer one equal, full, and third part or share of and in the * said sum of 9009*l.* 3*s.* 8*d.*, 3*l.* per cent reduced annuities, * 65 so comprised in the said indenture of settlement, unto the said Sarah Baskett, her executors, administrators, and assigns, as and for her original share and interest in the same trust moneys and premises, and to and for her own use absolutely.” If the statement that it was “ as and for her original share ” were all, I should have thought that the unappointed part of the fund would go just as if there had been no appointment ; but then there are added two restrictions, the first, “ that in case of no complete appointment, the then present appointment was intended to be made in lieu of all claims and demands of their said daughter to or for her original or principal share or interest in the same trust moneys and premises.” I incline to think that this clause alone makes no difference, and would amount to nothing more than what would be inferred from the appointment itself.

But there is another clause not to be found in any of the cases cited, namely, that the appointment in lieu of the original or principal share is to operate “ so as not to prejudice or affect the right or contingent interest of their said daughter under the proviso for accruer and survivorship of the share in the said trust moneys and

(a) 9 Ves. 456.

(b) 1 K. & J. 620.

premises in case of the death of any or either of the said other children, in such manner as was specified and contained in the said indenture of settlement.” That raises a distinction. If there had been no appointment, and one of the children had died, the others would take each 4500*l.* under the original settlement; this would have been their right if there had been no appointment. What, then, does this clause mean? — if, for instance, one of the two other children had died, does it mean that Sarah Baskett shall take half of the 6000*l.*, or, if there had been no appointment, such a sum as with the sum *appointed to her would amount to half of the original sum? If, however, 6000*l.* are all that remain to be appointed, what she would take would be 3000*l.* out of the 6000*l.*, but that would not be what she would have taken if there had been no appointment. I am not satisfied that this will make any difference, but I will look into the question more attentively; and if upon consideration I should think that it does make a difference, and affords grounds for departing from the rule, I shall act accordingly, but if not, I shall not attempt to disturb the rule which has been so long acted upon.

November 26.

The Lord Chancellor, after recapitulating the provisions in the settlement and the deed-poll, proceeded as follows: The question is one of construction, whether, by necessary implication, Mr. and Mrs. Baskett, the appointors, must not be taken to have appointed the other two-thirds to their two other daughters, subject of course to the absolute power of making a further appointment, which they reserved to themselves if they should see fit. At the conclusion of the argument I expressed myself as concurring in the view taken by the Vice-Chancellor of the general rule as established by the authorities, to the effect that *prima facie* an appointee is presumed to take a share in the unappointed fund. That is laid down in *Wilson v. Pigott*, (a) and clearly elucidated by the Master of the Rolls in *Wombwell v. Hanrott*. (b)

The question, however, still remains whether in this case it is not by necessary implication clear, that Mr. and Mrs. Baskett must have meant to appoint the other two-thirds to their other two daughters, subject to any right of accruer. I think this is

(a) 2 Ves. Jr. 351.

(b) 14 Beav. 143.

the necessary inference * from the terms in which the ap- * 67
pointment is made. The appointment of the one-third to Sarah is declared to be intended to be "in lieu of all claims and demands to or for her original or principal share or interest in the same trust moneys and premises," &c. This clause as I stated at the conclusion of the argument, and as I now think on principle and authority, would not have affected her right to an equal share with her two sisters in the unappointed part of the fund; the consequence would be that, on the death of the parents without making any further appointment, the unappointed 6000*l.* would be divisible in thirds among her other two sisters, *i.e.* each would take 2000*l.*, or, if either of the sisters should die under twenty-one and unmarried, then Sarah and the surviving sister would take each 3000*l.* But the deed-poll provides that the appointment thereby made should not prejudice or affect the right or contingent interest of Sarah under the proviso for accruer and survivorship contained in the settlement in case of the death of either of her sisters. This clause, however, appeared and still appears to me to be unnecessary if the deed was not to be construed as giving (subject to any future appointment) the two-thirds to the two other sisters, for if these two-thirds were unappointed, then the original settlement provides for the case of accruing as well as original shares in these two-thirds, and no special reference to that contingency was necessary. But if, under the deed-poll, the parents understood themselves to be securing the two-thirds to their daughters Elthedred and Elizabeth, to the exclusion of Sarah, then the clause was necessary in order to secure to Sarah a moiety of the share of either of her sisters who might die under twenty-one and unmarried.

The words to which I refer show that the parties making the appointment supposed that but for the introduction * of * 68
those words they would have excluded Sarah from a possible right in her sisters' shares, and this could only be because they understood that they were giving to them the portion of the fund not appointed to Sarah. It was suggested at the bar that in fact, previously to the execution of the deed of appointment, all the daughters had attained twenty-one, so that in fact no accruer could take place. This does not appear on the pleadings, but even if it did my view of the case would not be altered. It is plain that Mr. and Mrs. Baskett thought that there might be a case of

accruer, and that it was necessary to save to Sarah her rights in case such a contingency should occur, and this presupposes that the appointment did not leave the portion of the fund not given to Sarah unappointed.

The decree of the Vice-Chancellor must therefore be varied by introducing the necessary directions in accordance with the opinion I have expressed. The costs under the circumstances ought to come out of the testator's estate.

STODDART v. NELSON.

STANGER v. NELSON.

1855. November 24, 26. Before the Lord Chancellor Lord CRANWORTH.

Where a bequest is to "cousins" *simpliciter*, first cousins only will, in the absence of any thing to explain the meaning of the testator, be entitled.¹

THIS was an appeal from a decision of Vice-Chancellor STUART, on a question of what relatives of a testator were entitled to take, under a bequest to "cousins" contained in his will.

James Freeman, the testator, by his will dated the 17th March, 1847, after making certain specific bequests, gave all his freehold, copyhold, and leasehold estates to trustees, whom he appointed his executors, upon trust to get in and convert the same into money and to invest the money therefrom arising; and the *69 testator *declared that the trustees should stand seised, possessed, and interested of and in all his said freehold, copyhold, and leasehold estates and also of and in the moneys thereinbefore directed to be invested in trust, in the first place to pay his funeral and testamentary expenses and certain legacies therein mentioned, and subject thereto that the estates and trust money should be in trust for his the testator's son or reputed son James Freeman, his executors, administrators, and assigns absolutely, and if James Freeman should die before he should attain his age of twenty-one years and without leaving lawful issue, then the trustees for the

¹ See *Crook v. Whitley*, 7 De G., M. & G. 490; *Pride v. Fooks*, 3 De G. & J. 252; *Frogley v. Phillips*, 30 Beav. 168.

time being of his the testator's will should stand seised, possessed of, and interested in all his said freehold, copyhold, and leasehold estates upon trust to sell the same in manner therein mentioned, and to stand possessed as well of the proceeds of such sale or sales as of the said trust money by his said will directed to be invested as aforesaid (subject, nevertheless, to the trusts thereinbefore declared) in trust for and to pay the same to all his, the said testator's, cousins who should be living at his, the said testator's, decease in equal shares, their executors, administrators, and assigns for their own use and benefit. The testator died on the 3d January, 1848, and James Freeman the son on the 20th April, 1854, an infant of the age of ten years.

On the 16th April, 1855, a special claim was filed by George Stoddart and others, who were respectively the first cousins once removed and second cousins of the testator living at his death, against the executors, and three other persons who were the first cousins of the testator living at his death, submitting that the plaintiffs and the three first cousins and all other cousins, if any, of the testator living at his death were entitled to his residuary real and personal estate in equal shares, and claiming accordingly.

* On the 31st May, 1855, a bill was filed by Robert Stanger * 70 and others, the first cousins of the testator living at his death, being children of brothers and sisters of the testator's father Joseph Freeman and his mother whose maiden name was Stanger, against the executors and the plaintiffs to the claim, submitting that according to the true construction of the will in the events which had happened, the first cousins of the testator living at his death were entitled to his residuary real and personal estate in equal shares in exclusion of any other cousins, and praying a decree accordingly, and administration of the estate.

The case came on before Vice-Chancellor STUART in July, 1855, when his Honor, being of opinion that there was no authority limiting the meaning of the word in question, made a decree declaring that the plaintiffs in the claim, being the first cousins once removed and second cousins, were within the words of the will, and directing an inquiry who were the cousins of the testator living at his death. His Honor, however, intimated that, as a stop must be made somewhere, he could, when he had the certificate, exclude those cousins who seemed too remote.

From this decision the plaintiffs to the bill, the first cousins, appealed.

Mr. Malins and *Mr. C. W. Faber*, for the plaintiffs in the claim, the first cousins once removed and second cousins of the testator. — They argued that there was no authority for excluding any persons who legitimately fell within the meaning of the word “cousins,” and that there was no ground for saying that a testator using the word “cousins” *simpliciter* intended to designate * 71 first cousins * only. They cited *Caldecott v. Harrison*, (a) and referred to *Mayott v. Mayott*, (b) *Silcox v. Bell*, (c) *Charge v. Goodyer*, (d) *Sanderson v. Bayley*, (e) *Williams on Executors*, Vol. II. p. 885, 3d ed.

Mr. Bacon and *Mr. Batten*, for the plaintiffs to the bill, the first cousins of the testator. — They argued that the word “cousins,” in its original meaning, apparently included all relations, and referred to various dictionaries in support of this position; that it had, however, in modern times, received a more limited meaning even in ordinary language, — brothers and sisters, uncles and aunts, being clearly excluded; and that, carrying out the principle of limitation which the Court had applied in reference to the word “relations,” — *Roach v. Hammond*, (g) *Anonymous*, (h) — the right meaning to give to the word “cousins” was to limit it to first cousins only.

Mr. C. Wood, for the trustees.

November 26.

THE LORD CHANCELLOR. — In this case I have come to the conclusion that the only persons who can take are the first cousins of the testator living at his death. The testator has unfortunately used expressions without being aware of their effect, and the Court has nothing to guide it as to what his meaning was but the words themselves, the case being wholly untouched by authority.

* 72 In other instances * there have been circumstances enabling the Court to put an interpretation on the words used, but

(a) 9 Sim. 457.

(e) 4 Myl. & Cr. 56.

(b) 2 Bro. C. C. 125.

(g) Prec. Ch. 401.

(c) 1 S. & S. 301.

(h) 1 P. W. 326.

(d) 3 Russ. 140.

there is nothing of the sort here. The testator simply directs his estates to be sold, and the proceeds to be applied in payment of his funeral and testamentary expenses and certain legacies, and upon an event which has happened that the proceeds shall be divided among all his "cousins" who shall be living at his death. The question now to be determined arises between first cousins, second cousins, and first cousins once removed, and the Vice-Chancellor has determined in favour of cousins generally, and ordered advertisements for all cousins to come in. The decree in this form cannot be right, for it ought not to have directed an advertisement without determining what cousins were entitled, and the Court was bound to declare what was the meaning of the word used. I have come to the conclusion that it means first cousins only.

I must assume that the testator intended to direct a trust which could be carried into execution; and, if the door was opened to all cousins, the meaning of the word would be much the same as that of relations. This consideration led me to look at the first cases, where words, including relations generally, were cut down to next of kin, according to the Statute of Distributions; and there is a case of *Carr v. Bedford*, (a) 30 Car. 2, that is about seven years after the statute was passed. There the testator Edmund Arnold, "having no child, by his will, whereof he made the defendant Bedford executor, gave several legacies to several persons and uses, and gave all the rest and residue of his moneys and personal estate, after debts paid, to and amongst his kindred, according to their most need, to be distributed amongst them by his executors, saving such legacies as * he should by his will or any codicil further * 73 dispose of:" and the Court, "taking into consideration to what degree of kindred the testator's bequest of the residue of his personal estate to his kindred of most need could extend; that the Act of Parliament for better settling intestates' estates was the best rule that could be observed as to the limiting the extent of the word kindred, and that it should extend only to the testator's sister Anne Carr and her children, and to the testator's nephews and nieces now living; and that no kindred out of the degree of a brother or sister to the testator, or a child of such brother or sister, ought to come in or have any share of the said residue;" that is to say, that an Act having passed regulating who should take in

(a) 2 Reports in Chancery, 146.

cases of intestacy, the Court, cutting the knot in the case before it, said that the best way was to determine, that by kindred the testator must be taken to have meant those whom the Act pointed out. Exactly the same rule cannot be applied here, because the term cousins is a more general word than kindred; and I can, therefore, only act by analogy, and consider what is the practical construction to be put on the word.

I think that, if a testator says no more than that he gives to "cousins," he must be taken to mean first cousins. That will be a practical construction, and one by which the parties entitled will be easily ascertained: it coincides too with ordinary experience, for when a person speaks of cousins he generally means first cousins, the children of an uncle or aunt; and I think that, in the present case, there being first cousins, this is the proper construction to adopt. The decree must, therefore, be varied accordingly, and the suit by cousins more remote must be dismissed. The declaration will be, that by cousins are meant first cousins only: the costs of all parties ought to come out of the estate.

1855. November 6, 7. December 3. Before the Lord Chancellor Lord CRANWORTH.

A testatrix by her will directed her executors as opportunity might offer to apply such part or parts of the residue of her personal estate as by law might be legally applied to such purposes in the endowment of district churches or chapels in populous parishes: *Held*, affirming the decision of Vice-Chancellor WOOD, that this gift was good, not being within the provisions of the Statute of Mortmain.

A gift of personal estate to be employed in the endowment of existing churches or chapels, is not void as being a gift of personal estate to be laid out or disposed of in the purchase of land.¹

¹ But a charitable legacy to be applied in building is void under the Statute of Mortmain, unless the testator, by his will, indicates an intention that no part of the money shall be applied in the purchase of a site for the building. *In re Watmough's Trusts*, L. R. 8 Eq. 272. See *Philpott v. St. George's Hospital*, 6 H. L. Cas. 338; *Attorney-General v. Hull*, 9 Hare, 647; *Dunn v. Bownas*, 1 K. & J. 596; *Tatham v. Drummond*, 34 L. J. Ch. 1; *Booth v. Carter*, L. R. 3 Eq. 757.

A similar gift, applicable to churches and chapels to be hereafter erected, would be supported, *semble*.

Shares in an incorporated company are not an estate or interest in land within the meaning of the Statute of Mortmain; nor does it make any difference that the Act of Parliament incorporating the company does not contain a clause declaring the shares to be personal estate.¹

Arrears of rent are not an estate or interest in land within the meaning of the Statute of Mortmain.

Ware v. Cumberlege, 20 Beav. 503, overruled.

THIS was an appeal by the plaintiffs against a decision of Vice-Chancellor Wood. The questions in the suit, which was for the administration of the estate of Miss Jane Cook, related to a bequest contained in the will of that lady with reference to a particular portion of her residuary estate, the plaintiffs, who were some of her next of kin, contending, first, that the whole bequest was invalid under the Statute of Mortmain, and, secondly, that certain items of which the residue consisted were interests in land within the meaning of that statute. The Vice-Chancellor decided in favour of the validity of the bequest.

A full report of the case, and of the judgment of his Honor, together with the decree, is given in the 11th volume of Mr. Hare's Reports, page 1; and the following statement, which is necessary to render the argument intelligible to the reader, is taken from that report.

The will in question, which was dated the 5th June, 1850, contained among others the following bequests: "I give and bequeath all my personal estate of which *I may die pos- * 75 sessed to my executors in trust to be disposed of by them in the manner hereinafter mentioned. I direct them to invest in their names such a sum of sterling money as will purchase the sum of 2200*l.* 3½ per cent reduced annuities and to pay the dividends thereof as and when received unto Jane Hill Walker of," &c., "for her separate use." Then followed a gift of the same sum, at the decease of the said legatee, to her son and daughter. The testatrix then proceeded: "I direct my executors to transfer to the trustees for the time being of the Society for Promoting Christianity among the Jews all the 3 per cent consolidated bank annuities which at my decease shall be standing in my name in the books of

¹ See *Myers v. Perigal*, 2 De G., M. & G. 599, n. (2) and cases cited; *Entwistle v. Davis*, L. R. 4 Eq. 272; 1 *Jarman Wills* (3d Eng. ed.), 202 *et seq.*; *The University of London v. Yarrow*, 1 De G. & J. 72.

the governor and company of the Bank of England, the dividends thereof to be applied for the general purposes of the society, but I earnestly recommend to the committee of such society not to expend the capital thereof or any portion thereof unless for extraordinary contingencies, but to consider it as a reserve fund and from time to time as soon as convenient to replace and restore any portion which may have been used. I direct my executors to transfer to the treasurer for the time being of the institutions or societies after mentioned, the following sums of $3\frac{1}{4}$ per cent reduced annuities: viz., 'to the Operative Jewish Converts Institution, 1000*l.*;' 'to the Episcopal Jews Chapel Abrahamic Society, 2000*l.*;' 'to the Trinitarian Bible Society, 2000*l.*;' 'to the Church Missionary Society, 5000*l.*;' 'to the British and Foreign Bible Society, 5000*l.*;' 'to the Malta Protestant College, 1000*l.*;' 'to the Edinburgh Bible Society for the distribution of Gaelic Bibles and Testaments in the Highlands and Islands of Scotland, 1000*l.*;' and 'to the Irish Society of London for the distribution of Bibles,

Testaments, and Common-Prayer Books in the Irish language
 * 76 and character amongst the Irish-speaking population * of Ireland, 1000*l.*;' all which sums I direct shall be applied by the managers or committees of the said respective institutions or societies in furtherance of the objects of such institutions or societies respectively; and, should I not have sufficient $3\frac{1}{4}$ per cents at my death to answer such bequests, my executors shall purchase the deficiency from my other personal estate legally applicable to the purposes aforesaid. And I give the following legacies of sterling money: viz., to the Right Reverend H. Gobart, Bishop of Jerusalem; the Reverend John Nicolayson, minister of Christ Church, Jerusalem; and John Christian Richard, now or late of Palestine Place, Bethnal Green, in the county of Middlesex, clerk,—the sum of 200*l.* each for their own respective use as tokens of my esteem and regard. To each of my executors hereinafter appointed, the sum of 300*l.*, as some compensation for the trouble they will have in the execution of the trusts of this my will. And I specifically will and direct that the legacies of sterling money hereby given shall primarily be charged on, and come out of such part of my personal estate (if any) as in its nature cannot legally be bequeathed for charitable purposes. And I further will and declare that all the said transfers shall be made and legacies paid within three months from the time of my de-

cease, and as to the legacies of sterling money free of legacy duty. . . . And as to the residue of my personal estate which shall not be otherwise disposed of by me, I direct my said executors, as opportunity may offer, to apply such part or parts thereof as by law may be legally applied to such purposes in the endowment of district churches or chapels in populous parishes in order that the poor may have the gospel preached to them in this country. And I wish a preference given to those parishes the churches of which are under the patronage of the trustees of my late friend, the Reverend Charles Simeon and other similar * trusts.” The * 77 testatrix then appointed the defendants Hall, Browne, and Frampton her executors ; and the will concluded with the following passage: “ And as to my real estate and those parts (if any) of my personal estate inapplicable by law to the purposes aforesaid and not herein disposed of, I at present make no disposition.”

The Master, under a reference directed in the suit, found that the estate of the testatrix, amongst other things, consisted of 34,788*l.* 3½ per cent annuities (value on the 11th February, 1851, the day of the testatrix's death, 34,430*l.* 4*s.* 4*d.*), 500*l.* bank stock (value at the same time 1,075*l.*), 27,069*l.* 5*s.* consols (value at the same time 26,121*l.* 16*s.* 6*d.*), eight 100*l.* shares in the Oxford Canal Navigation Company (value at the same time 1280*l.*), ninety-nine 100*l.* shares, sixty-three 50*l.* or half shares, eight 25*l.* or quarter shares, and four 12*l.* 10*s.* or eighth shares in the Grand Junction Canal Company (value at the same time 8246*l.*), 177 preferential stock in the Grand Junction Canal Company created under the General Canal Act of the 10 & 11 Vict. c. 94, and the Companies Clauses Consolidation Act, 1845 (value at the same time 1947*l.*), twenty 100*l.* shares in the Grand Union Canal Company (value at the same time 480*l.*), one hundred and forty-six 50*l.* shares in the Grand Junction Water-works Company, (value at the same time 10,074*l.*), and the sum of 876*l.* due for dividends thereon accrued up to the 12th December, 1850, 860*l.* 13*s.* 1*d.* cash due from John Brogden and John Brogden the younger, for the purchase of the shares and interest of the testatrix in the Ulverstone Canal Navigation Company and Canal Warehouse of the said company including moneys advanced by her to the company on mortgage of the said Ulverstone Canal, two 100*l.* shares in the Oxford Gas-light and Coke * Company (value * 78 at the same time 560*l.*), the sum of 12,000*l.* the amount of

the purchase-money of estates in the county of Buckingham by agreement of the 25th July, 1848, contracted to be sold to Sir Harry Verney, Bart., together with the rents and profits of the said estate due at and apportioned up to the day of the death of the testatrix, the purchase-money of estates in the county of Buckingham contracted to be sold by the testatrix to Francis Smith, the sum of 52*l.* 4*s.* the balance of purchase-money of a plot of land at Charlton Kings contracted to be sold by the testatrix to Samuel Higgs Gael, Esq., furniture, &c. (value at the same time 260*l.* 0*s.* 6*d.*), arrears of rent due to the testatrix at the time of her death 164*l.* 11*s.* 1*d.* whereof the sum of 67*l.* 13*s.* had since been received and the remainder whereof was alleged to be bad, the sum of 10,139*l.* 12*s.* 6*d.* cash standing to the credit of her account with the City of Gloucester Bank, and two sums 29*l.* and 20*l.* 4*s.* 4*d.* due from other persons.

Mr. Rolt and *Mr. Bevir*, for the plaintiffs. — They insisted that if the trust in question might be executed in such a way as necessarily to lead to the bringing of land into mortmain, it was void; that the scheme which the Vice-Chancellor had directed could not be carried out consistently with the Statute 9 Geo. 2, c. 36, and that therefore it was necessary at once to take the objection by the present appeal. They examined and commented on the following cases, as authorities in favour of the view they were submitting: *Pelham v. Anderson*, (a) *Chapman v. Brown*, (b) *The Attorney-General v. Parsons*, (c) *The Attorney-General v. Davies*, (d) * 79 *Pritchard v. Arbouin*, (e) *The Attorney-General v. Hodgson*, (g) *Longstaff v. Rennison*. (h) They then commented on the cases relied on by the Vice-Chancellor in his judgment; namely, *Sorresby v. Hollins*, (i) *Attorney-General v. Williams*, (k) *Mather v. Scott*, (l) *Henshaw v. Atkinson*, (m) *Trye v. The Corporation of Gloucester*. (n) They noticed that *Sorresby v. Hollins* was one of those earlier cases referred to by Lord ELDON as having been decided at a time when the Court went out of its way to

(a) 2 Eden, 296.

(b) 6 Ves. 404.

(c) 8 Ves. 186.

(d) 9 Ves. 535.

(e) 3 Russ. 456.

(g) 15 Sim. 146.

(h) 1 Drew. 28.

(i) 9 Mod. 221.

(k) 2 Cox, 387.

(l) 2 Keen, 172.

(m) 3 Madd. 306.

(n) 14 Beav. 173.

evade the statute. They submitted that the testatrix clearly pointed to the establishment of new places of worship, and that, consistently with the scheme of the will, endowment would necessarily include building. They further contended as to the several items of which the residue was found to consist that they were interests in land within the meaning of the statute.

The following cases were also cited on the first question: *Longhead v. Phelps*, (a) *Grimmett v. Grimmett*, (b) *Proctor v. Bishop of Bath and Wells*, (c) *Grieves v. Case*, (d) *Giblett v. Hobson*, (e) *Baker v. Sutton*, (g) *Attorney-General v. Hull*, (h) *Re Clancy*. (i)

The following authorities were cited and commented on upon the second point: *Knapp v. William*, (k) *Howse v. Chapman*, (l) *Finch v. Squire*, (m) *Baxter v. Brown*, (n) *Sparling v. Parker*, (o) *Tomlinson v. Tomlinson*, (p) * *Hilton v. Giraud*, (q) * 80 *Ashton v. Lord Langdale*, (r) *The Attorney-General v. Jones*, (s) *Myers v. Perigal*, (t) *The Attorney-General v. Giles*, (u) *Ware v. Cumberlege*. (v)

Mr. Wigram and *Mr. Cole*, for the executors, supported the decision of the Vice-Chancellor. — They submitted that the right way of dealing with the case was to consider first what the trusts actually were, and then to apply to them the statute, so as to see whether it interfered with any of them; that the only direction given by the testatrix, which could bring the bequest within the statute, was that with regard to “endowment,” but that pointed not to any purchase of land or erection of a building, but to providing with money some institution already in existence. *The Church Building Society v. Barlow*, (w) *Attorney-General v. Wil-*

(a) 2 Sir W. Black. 704.

(b) Amb. 210.

(c) 2 H. Black. 358.

(d) 4 Bro. C. C. 67.

(e) 3 Myl. & K. 517.

(g) 1 Keen, 224.

(h) 9 Hare, 647.

(i) 16 Beav. 295.

(k) 4 Ves. 430, n.

(u) 5 Law J. (Chanc.) 44; and see Shelford on Mortmain, p. 987.

(v) 24 Law J. (Ch.) 630: since reported, 20 Beav. 503.

(w) 3 De G., M. & G. 120.

(l) 4 Ves. 542.

(m) 10 Ves. 41.

(n) 7 Man. & Gr. 198.

(o) 9 Beav. 450.

(p) 9 Beav. 459.

(q) 1 De G. & S. 183.

(r) 4 De G. & S. 402.

(s) 1 Mac. & G. 574.

(t) 2 De G., M. & G. 599.

liams, (a) *Henshaw v. Atkinson*. (b) They submitted further that any inducement to purchase lands, held out by the direction as to endowment, was not such a tendency to bring lands into mortmain as could possibly draw the case within the statute, nor could that effect be produced by the authority to purchase lands given to the trustees. *Baker v. Sutton*, (c) *The Attorney-General v. Gladstone*. (d) They noticed the cases cited on the other side, and remarked that they were all instances of where the testator was clearly dealing with real estate, and this circumstance distinguished them from the present.

* 81 * With regard to the different items of which the estate consisted, they urged that the current of authorities established that shares in a commercial company, although that company may be in the occupation of land for the necessary purposes of its trade, were not real estate. *Thompson v. Thompson*, (e) *Hilton v. Giraud*, (g) *Sparling v. Parker*, (h) *In re Langham's Trust*, (i) *Ashton v. Lord Langdale*, (k) *Walker v. Milne*, (l) *Myers v. Perigal*, (m) *Bradley v. Holdsworth*. (n) The only case which was against this view, and it applied only to the Grand Junction Waterworks shares, was that of *Ware v. Cumberlege*, (o) in which the Master of the Rolls seemed to lay down that where the Act of Parliament incorporating the company did not provide that the shares should be personal estate, there the shares would be real estate; but it was submitted that this distinction could not be supported. As to arrears of rent, it was impossible to maintain that they savoured of realty in a sense to bring them within the Act. *Finch v. Squire*, (p) *The King v. Bates*, (q) *The Attorney-General v. Jones*. (r)

Mr. Wickens, with whom was the Solicitor-General, for the Attorney-General. — He supported the argument of the executors, and

(a) 2 Cox, 387.

(b) 3 Madd. 306.

(c) 1 Keen, 224.

(d) 13 Sim. 7.

(e) 1 Coll. 381.

(g) 1 De G. & S. 183.

(o) 24 Law J. (Chanc.) 630; since reported, 20 Beav. 503.

(p) 10 Ves. 41.

(q) 3 Price, 341.

(h) 9 Beav. 450.

(i) 10 Hare, 446.

(k) 4 De G. & S. 402.

(l) 11 Beav. 507.

(m) 2 De G., M. & G. 599.

(n) 3 M. & W. 422.

(r) 1 M. & G. 574.

December 8.

* THE LORD CHANCELLOR. — I have looked through the * 103 affidavits and the answer of Mrs. French, and I think it admits of no doubt that Mr. French, at the time when he made the assignment, was in a state of insolvency. [His Lordship here referred to the portion of Mrs. French's answer, which at the highest only spoke as to her husband being able to meet his liabilities if his assets were collected, and proceeded,] — but up to that time only a very small portion of those assets had been got in. It was quite clear, therefore, that the transaction was one, the effect of which was, in the language of the statute, to delay and hinder his creditors, whom the consideration for the annuity would have been the ready means of satisfying.

I may observe, that in my opinion (though I am not aware of any authority on the point), if any time hereafter the assets of the testator should be realized and found more than sufficient to meet all his liabilities, this Court would find the means of restoring the settlement and giving Mrs. French the benefit intended to be conferred upon her. All that I intend now to decide is, that the creditors of William French must be satisfied. With respect to the argument that Mrs. French must be regarded as a purchaser for value, because she was bound not to carry on the trade of the husband, I am of opinion that there is no such obligation. The decree must, therefore, be varied by setting aside so much of the settlement as relates to her annuity, and so much of the settlement will be declared void as against the creditors of William French, without prejudice to any question which may hereafter arise, if the assets of Mr. French should ultimately turn out sufficient to pay all his creditors in full. I shall not say that it was voluntary or fraudulent, but simply void as against the creditors of William French.

1855. December 14. Before the Lord Chancellor Lord CRANWORTH.

A testatrix devised her real estates to trustees in trust as to the rents, issues, and profits thereof for all and every the children now or hereafter to be born of my niece M. C., who shall be living at my decease, during their lives, in equal shares, and for the survivors and survivor of them for life, &c., and after the decease of the survivor "in trust for all the lawful issue, male and female, of such of the children of my niece, now or hereafter to be born, as shall be living at my decease, in equal shares and proportions as tenants in common, and not as joint tenants, and the heirs of the body and respective bodies of all and every the issue of the said children, and on the death and failure of heirs of the body of any one or more of the issues of the said children," &c., in trust for the survivors, &c. At the testatrix's death her niece had two daughters, one of whom was married and had issue five children: *Held*, that the daughters of the niece took estates for life only, with remainder to their issue as purchasers.¹

MARY ROBINSON, by her will, dated the 3d October, 1833, gave and devised her freehold estates in the county of York, unto Thomas Clarke and John Wightman, their heirs, executors, administrators, and assigns, upon trust, as to the rents, issues, and profits thereof, "for all and every the children now or hereafter to be born of my niece Mary Carr, the wife of John Carr, of Carr Lodge, near Wakefield, esquire, by her present or any after taken husband, who shall be living at my decease during their respective natural lives in equal shares, and for the survivors and survivor of them during their, his, or her lives or life; and I direct that the rents and profits of the said estates shall be retained by the said trustees, and invested so as to accumulate at interest for the term of twenty-one years after my decease, and that, after the determination of that period, the rents and profits afterwards accruing shall be for the equal benefit of the said children during their lives and the lives of the survivors and survivor of them; and as to the said accumulated fund at the expiration of the said term of twenty-one years, I direct that the same shall be laid out and applied at such time or times as the said trustees shall in their discretion think expedient, in the purchase or purchases of any lands,

¹ See 2 Jarman Wills (3d Eng. ed.), 414 *et seq.*

tenements, or hereditaments in the county of York, which they my said trustees may think eligible, and which I direct shall be * conveyed to the trustees, in trust, as to the rents, * 105 issues, and profits thereof, for the said children of my said niece during their lives, and for the survivors and survivor of them during their, his, or her lives or life ; and from and after the decease of the last survivor of the said children, then as to all the said hereinbefore devised estates, and also as to such purchased estates as aforesaid, in trust for all and every the lawful issue, male and female, of such of the children of my said niece, now or hereafter to be born, as shall be living at my decease as aforesaid, in equal shares and proportions, as tenants in common, and not as joint tenants, and the heirs of the body and respective bodies of all and every the issue of the said children, and on the death and failure of heirs of the body of any one or more of the issue of the said children, as well the original share or shares of him, her, or them so dying, and of whom there shall be such a failure of heirs of the body as aforesaid, as also such share or shares as shall accrue to him, her, or them, or his, her, or their issue, by virtue of this present clause, shall be in trust for the survivors and survivor and other or others of them, if more than one, in equal shares, as tenants in common, and not as joint tenants, and for the heirs of the body or respective bodies of such surviving issue, and for default of issue to inherit under the preceding limitations, in trust for such person or persons, for such uses, trusts, intents, and purposes, and with, under, and subject to such powers, provisos, declarations, and agreements, as the last survivor of the said children of my said niece, notwithstanding coverture, and whether she shall be sole or married by any deed or instrument in writing to be by her signed, sealed, and delivered in the presence of, and attested by two or more credible witnesses, or by her last will and testament in writing, or codicil thereto, or any writing purporting to be, or in the nature of her last will and testament, or codicil * thereto, to be by her signed and published in the presence * 106 of, and to be attested by three or more credible witnesses, shall direct, limit, or appoint, give or devise the same, and in default of any such limitation, appointment, gift, or devise, and so far as the same shall not extend, I give and devise the same to my own right heirs for ever. I also direct, that after the period hereinbefore appointed for the said rents and profits to cease to accu-

mulate, and until a suitable purchase or purchases shall have been made, the interest of the said accumulated fund shall be applied to the same persons as for the time being would by virtue of the provisions of this my will be entitled to the rents and profits of the hereditaments intended to be purchased ;” and the testatrix gave and devised her copyhold and leasehold estates unto the same trustees, upon the same trusts as those on which the freehold estates were given, or as near thereto as the rules of law would permit.

The testatrix died on the 7th July, 1839, and at her decease Mary Carr had two children living ; namely, Mary Ann Parker and Maria H. Carr. The plaintiffs in the suit were Mary Ann Parker, the wife of the plaintiff, Thomas G. Parker, and Maria H. Carr, and the defendants were the trustees of the will, and the five infant children of Thomas George Parker and Mary Ann Parker. A disentailing deed having been executed by both the female plaintiffs, and acknowledged by the said Mary Ann Parker, the bill prayed a declaration that they, under the will of testatrix, took joint estates in the freehold and copyholds for life, with several inheritances in tail, and for a conveyance of the legal estate in the freeholds, and for a declaration that they were entitled as tenants in tail of the money accruing from the accumulated rents and profits, and that they were entitled absolutely to the leaseholds ; that the trustees might be directed to

* 107 * account for the accumulations of the rents and profits of the estates, since the testatrix’s decease, and to pay the same to the plaintiffs according to their rights and interests therein on their respectively executing disentailing assurances thereof.

When the cause came on to be heard before the Vice-Chancellor STUART on the 26th May, 1855, his Honor declared, that, according to the true construction of the will, the plaintiffs took only estates for life in the real estates of the testatrix. The plaintiffs now appealed to the Lord Chancellor.

Mr. Malins, Mr. Rudall, and Mr. A. C. Kirkman, for the plaintiffs, in support of the appeal. — There can be no limitation over after failure of heirs of the body, and in this will there being no limitation over until all the issue of the tenant for life is extinct, the general intention must prevail. This is one of those cases in which the words must be construed so as best to suit the inten-

tion of the testatrix, and in which, therefore, the devisees for life must, by necessary implication, and in order to effectuate the general intention of the testatrix, be construed to take estates tail. The mere addition of words of limitation will not convert the previous word "issue" into a word of purchase. The leading authority upon which we rely for this position is *Roe d. Dodson v. Grew*, (a) where a testator having devised unto his nephew G. for his natural life, and after his decease to the use of the male issue of his body lawfully to be begotten, and the heirs male of the body of such issue male, and for want of such male issue, then over, — the Court of Common Pleas held that G. took an estate tail. The Lord Chief Justice WILMOT observing, "the intention certainly was to give G. an estate for life only; but the intention also was, that as long * as he had any issue male the estate should * 108 not go over; and if we balance the two intentions the weightier is that all the sons of G. should take in succession." It will be said that in that case there was no tenancy in common, but it is necessarily to be implied.

[LORD CHANCELLOR. — The Judges in that case appear to me to have assumed that the issue were all to take in succession, but I cannot understand on what ground.]

In the case of *Denn d. Webb v. Puckey* (b) there was a devise to the testator's grandson for life, without impeachment of waste, and after his decease to the issue male of his body lawfully begotten, and to the heirs and assigns of such issue male for ever, and in default of such issue male, then over; and there the Court held, that in order to effectuate the general intention of the testator, the grandson took an estate tail, because the male descendants of his grandson should take the estate, and that the gift over was not to take effect until all such male descendants were extinct. On the same principle in the case of *Frank v. Stovin* (c), a devise to A. for life, and after his decease to the use of the issue male of the body of A. lawfully begotten and to be begotten, and their heirs, and in default of such issue over, — Lord ELLENBOROUGH held that A. took an estate tail. The cases of *King v. Burchell*, (d) *Hodgson v.*

(a) 2 Wils. 322.

(c) 3 East, 548.

(b) 5 T. R. 299.

(d) 1 Eden, 424.

Merest, (a) *Toller v. Attwood*, (b) were all decided upon the authority of *Roe d. Dodson v. Grew*. (c) The only distinction, if distinction it can be called, between the authorities cited and the present case is, that in this will there is a declaration that the children shall take as tenants in common; but that constitutes no real difference, and similar words were rejected in *Jesson v. Wright*. (d)

[The Lord Chancellor referred to *Doe d. Candler v. Smith*. (e)]

* 109 * We submit that the word "issue" here must be construed as heirs of the body: *Harrison v. Harrison*; (g) and, therefore, that in this case the superadded words "heirs of the body of such issue" are superfluous. *Shaw v. Weigh*. (h)

They relied upon the observation of Wood, V. C., in *Woodhouse v. Herrick*, (i) as to the word "issue" being flexible; and they referred to *Doe d. Bosnall v. Harvey*, (k) *Tate v. Clarke*, (l) *Doe d. Atkinson v. Featherstone*, (m) *Doe d. Earl of Lindsey v. Colyear*. (n)

Without calling upon the respondents, the Lord Chancellor said: I think it is clear that the daughters of the testatrix's niece, who are first takers, were to take an estate for life only. I quite agree with the general rule which has been advanced on the argument, that when the gift is to one for life, and after his death to the issue of his body and the heirs of such issue for ever; there, by the addition of words of limitation, the testator is only using words which are idle, and which shall not prevail to convert the previous word "issue" into a word of purchase. But, at the same time, the Court will always consider whether the superadded words as used can bear a sensible operation in controlling the preceding limitations. In my opinion the cases which have been

(a) 9 Price, 556.

(b) 15 Q. B. 929.

(c) 2 Wils. 322.

(d) 2 Bligh, 1.

(e) 7 T. R. 531.

(g) 8 Scott, N. R. 862.

(h) 2 Strange, 798.

(i) 1 K. & J. 352.

(k) 4 B. & C. 610.

(l) 1 Beav. 100.

(m) 1 B. & Ad. 944.

(n) 11 East, 548.

cited have no application. In the case of *Roe d. Dodson v. Grew*, (a) which is generally referred to as a leading authority, and governing all the others of its class, there was a devise to one for life, with remainder to the use of the male issue of his body and the heirs male of the body of such issue male, and for want of such male issue over; and the question was, whether the first taker took *an estate for life or in tail. Whether I *110 should have arrived at the same conclusion as the Chief Justice WILMOT, with respect to the what he called weightier intention, that the estate was not to go over until failure of the issue male of the first taker, I do not say; but the word "issue" being a word of flexible meaning, and being used promiscuously with the word "heirs" in the Statute De Donis, *primâ facie* the meaning of the word may be explained by the context; and that afforded a simple and obvious ground for holding that the word "issue" was to be construed as a word of limitation. Here, however, the devise is in trust for the benefit of the children of the testatrix's niece who should be living at her decease, during their lives in equal shares, and for the survivors and survivor of them for life, and after the decease of the survivor in trust for all the lawful issue, male and female, of such children of her niece as should be living at her decease, in equal shares as tenants in common, and not as joint tenants, and the heirs of the body and the respective bodies of all and every the issue of the said children; and on the death and failure of heirs of the body of any one or more of the issue of the said children, in trust for the survivors, &c. It is impossible to doubt as to the meaning of the testatrix. It was said that, in the present case, the devise being to the issue of the children as tenants in common, constituted no difference between it and the cases cited, and that in those cases it must be inferred that there were similar provisions; but, in my opinion, there is no foundation for that argument, which begs the whole question.

His Lordship intimated his opinion that, under the limitation to the lawful issue of the children of the testatrix's niece, the children were to take *per capita*. The appeal was accordingly dismissed; but, by arrangement, the costs were ordered to come out of the fund directed to be accumulated.

* 111 * ATTORNEY-GENERAL *v.* STEPHENS.

1855. November 24, 26. December 3, 5, 6, 21. Before the Lord Chancellor
Lord CRANWORTH.

Where a tenant of land for life or for years or at will has lands of his own adjoining to that which he so holds as tenant, it is his duty to keep the boundaries between them clear and distinct, so that at the expiration of the tenancy the reversioner or remainder-man may be able without difficulty to resume possession of what belongs to him; and if the person having such partial interest neglects this duty, and suffers the boundaries to be confused so that the reversioner or remainder-man cannot tell to what lands he is entitled, this Court will give relief by compelling the persons who have occasioned the difficulty, to make good, out of what may be considered to lie in the nature of a common fund, that portion of it which belongs to another, but in order to obtain this relief it must be shown that the tenant is in possession of the specific land originally demised.¹

An information on behalf of the poor of a parish, stated an agreement dated in 1634, by the then Earl of Portland, which recited, that there lay in his park at R., divers parcels of land which contained about six and a half acres, and belonged to the poor of the parish, for which lands, lying dispersed in his grounds, being theretofore ordained for good and charitable uses, the earl was desirous to give a full yearly rent and satisfaction, and thereby promised and agreed to pay to the church-wardens and overseers of the parish for the time being yearly the sum of 6*l.*, and the earl thereby promised and agreed to make such further assurance thereof as by counsel should be advised, and to set out sufficient land of a better value for performance thereof, which he would either tie for the payment of the yearly rent, or otherwise assure and convey to such person and persons and their heirs as by the vestry of the parish should be nominated to be feoffees in trust for the same. No conveyance was shown to be made in pursuance of this agreement; but it was in evidence, that the park of the earl, including the six and a half acres, originally consisted of 550 acres, of which the defendant was in possession of thirty-one, his predecessors in the estate having, since 1786, covenanted to indemnify the purchasers of the other portions of the park from the payment of the annual rent of 6*l.*, which, in all the conveyances since 1786, was described as an annual rent-charge paid to the parish, but which in the parish books was expressed to have been received for rent of parish land; in the year 1849, the defendant's ancestor had accepted a receipt for the 6*l.* as for "rent for parish land:" *Held*, that in order to make the payment operate as an estoppel so as to prevent the defendant disputing the fact that the six and a half acres formed part of his estate, it was essential to make out that the payments had

¹ See *Wake v. Conyers*, 2 Lead. Cas. in Eq. (3d Am. ed.) [370], [371] and cases cited; 1 Story Eq. Jur. §§ 620-622.

been from time to time made by him and his predecessors as for rent for land of which he and they were tenants, and therefore having regard to the only evidence adduced by the relators, namely, the entries in the parish books, the defendant was not estopped from denying that he was possessed of the six and a half acres of land originally demised by the parish to the earl.¹

Although the title-deeds of a person seised of land are not in general admissible in evidence against third persons to prove the truth of the facts therein asserted, yet, where, as in the present case, they are offered to show, not that a certain sum was due and paid for a rent-charge, and not for rent of land in the occupation of those who made the payment, but to show what the intention in making that payment probably was, and what they supposed their rights and liabilities to be, the deeds are clearly admissible.

Where, as in this case, a person makes a payment expressly or impliedly on account of something else than the rent of land of which he is tenant, such a payment is not a payment of rent within the 48th section of the Act 3 & 4 Will. 4, c. 27, and under such circumstances a defence founded on that statute is a complete bar.

THIS was an appeal by the defendant Stephen Lyne Stephens from a decree of Vice-Chancellor Wood. The information was filed at the relation of Alfred E. Dryden and John Fisher, church-wardens, * and William C. Hulme and James J. * 112 Dean, overseers of the parish of Putney. The information stated that in and previously to the year 1634 certain parcels of land in the hamlet of Roehampton, in the parish of Putney, in the county of Surrey, and containing by estimation six and a half acres, and the inheritance thereof in fee-simple, had been duly conveyed, limited, and assured upon certain uses and trusts for the benefit of the church and the poor of the parish of Putney; and under such uses and trusts the church-wardens and overseers of the parish were, in and previously to the year 1634, entitled to receive, and were actually in the receipt of, the rents and profits of the said parcels of land and hereditaments; that in and previously to September, 1634, the said lands and hereditaments were in the possession of the then Earl of Portland, as tenant at will to the said church-wardens and overseers, and were, together with other lands belonging to himself, enclosed by the earl before the date of the agreement thereafter mentioned; and that it was in the said month of September agreed between the church-

¹ See Taylor, Land. and Tenant (4th ed.), § 629, § 705 *et seq.*; Chitty Contr. (10th Am. ed.) 355 *et seq.* and notes; Towne v. Butterfield, 97 Mass. 105; Hawes v. Shaw, 100 Mass. 187.

wardens and overseers and the earl, that from thenceforth the earl should continue to occupy the said lands and hereditaments as tenant from year to year to the church-wardens and overseers, at the yearly rent or sum of six pounds, and that a memorandum of such agreement was then reduced into writing, and was signed and sealed by the earl and dated the 1st of September, 1634,

* 113 and was so * far as material as follows: "Whereas there lyeth w^{thin} my new park and several grounds at Roughampton divers parcels of land w^{ch} doe contain by estimation 6 acres and half bee they more or lesse and doe belong to the church and poore of ye pish of Putney in ye county of Surrey for w^{ch} lands lying dispersed w^{thin} my said grounds being heretofore ordained for good and charitable uses I am desirous and willing to give a full and valuable yearly rent and satisfaction and doe promise and agree to pay unto ye churchwardens and overseers for the poore of ye said parishe for ye tyme being yearly ye sum of 6 pounds the same to bee paid at ye feast of St. Michael the Archangel and ye annunciation of ye blessed Virgin Mary henceforth by even and equall portions yearly. And I doe further promise and agree to make such further assurance hereof as by councell learned shall be advised and to sett out sufficient land of a better value for performance thereof w^{ch} I shall either tye for ye payment of ye said yearly rent or otherwise assure and convey to such pson and psons and their heires as shall be by the vestrymen of the said parish or the greater part of them nominated to bee feoffees in trust for the same. In witness whereof I have hereunto sett my hand and seal the 1st day of September in the 11th yeare of the reign of our most gracious So^vaigne, Lord King Charles. PORTLAND."

The information then set out a description of the parcels of land and hereditaments, as the same existed at the time when they were enclosed by the Earl of Portland, from the minute-book of the parish of Putney for the year 1636, and stated that at the time of the making of the agreement of the 1st September, 1634, and of the minute in the parish book, the parcels of land were lying dispersed among other lands then belonging to the earl, but

* 114 were plainly marked out by * certain boundary marks, and were well known and capable of being identified with the description in the minute-book, and were, from the date of the agreement until the year 1641, held and occupied by the Earl of

Portland, together with the other lands and hereditaments; and that during all the aforesaid time the yearly rent of 6*l.* was duly paid by the earl to the church-wardens and overseers for his occupation of the lands, and that entries of the payment of the annual rent were, from time to time, duly made in the books of account of the parish; that the lands, among which the parcels of land mentioned in the agreement were so lying dispersed and intermixed as aforesaid, were, up to a recent date, commonly called or known as the Roehampton estate; that in the year 1641, the Roehampton estate came into the possession of one Sir Thomas Dawes, who occupied the same till the year 1651, and that during the whole period of such occupation the parcels of land and hereditaments were held by Sir Thomas Dawes, together with the other parts of the estate, as tenant from year to year to the church-wardens and overseers at the aforesaid yearly rent of 6*l.*, and that such rent was, during the whole period of such occupation, duly paid by him to the church-wardens and overseers; that in the year 1651 the Roehampton estate came into the possession of one — White, who held the same till 1655, when the same came into the possession of the Countess of Devon, who held the same until 1675, when it came into the possession of the Earl of Devon, who held the same until the year 1685.

The information then traced the successive occupiers of the property down to the year 1829, when the same came into the possession of Bennet Gosling, who held it until the year 1842. The information alleged that during all the aforesaid periods the parcels of land mentioned * in the agreement of the 1st of September, 1634, were held by the several successive occupiers of the Roehampton estate respectively, as tenants from year to year to the church-wardens and overseers of the parish of Putney, and that during all the aforesaid periods the yearly rent of 6*l.* per annum was duly paid by the several successive occupiers of the Roehampton estate to the church-wardens and overseers. * 115

The information then stated that in the year 1842 the Roehampton estate was purchased by Charles Lyne Stephens of the said Bennet Gosling, and that he entered into the actual occupation and possession thereof, and remained in such occupation and possession from the year 1842 until his death in 1851, when the Roehampton estate and the fee-simple and inheritance thereof descended upon and became vested in the defendant, Stephen Lyne

Stephens, who was the only son and heir-at-law of Charles Lyne Stephens ; and that from the date of the purchase of the Roehampton estate until his death in the year 1851, Charles Lyne Stephens had occupied the parcels of land mentioned in the agreement of the 1st of September, 1634, as tenant from year to year to the church-wardens and overseers of the parish of Putney, and that from the date of the purchase of the Roehampton estate, up to the time of his death, Charles Lyne Stephens had duly paid to the church-wardens and overseers of the parish of Putney the annual rent of 6*l.* per annum, in respect of his occupation of the said parcels of land ; that from the time of the death of Charles Lyne Stephens, in the year 1851, when the defendant became so as aforesaid entitled to the Roehampton estate, down to the 25th of March, 1853, the defendant had been in possession and actual occupation of the said parcels of lands and hereditaments comprised in

* 116 the agreement of the 1st September, 1634, * as tenant from year to year to the church-wardens and overseers of the parish of Putney, and had regularly paid to the church-wardens and overseers the annual rent of 6*l.* per annum, in respect of his occupation of the said parcels of land ; and that entries of the payment of the said annual rent by the different tenants of the said parcels of land and hereditaments during the whole period which had elapsed from the date of the agreement of the 1st September, 1634, to the 26th March, 1853, had, from time to time, been duly made in the books of account of the parish of Putney, and that all the books were still in existence.

The information then stated, that the parcels of land had, from various causes, greatly increased in value, and that the yearly rent of 6*l.* was now a very inadequate rent for the same, and that in 1851 it was resolved by the church-wardens and overseers of the parish of Putney, that an application should be made to the defendant to pay a higher rent than 6*l.* for his occupation of the said parcels of land and premises, or else to quit and deliver up possession of the same, and that it was also resolved that an application should in the first instance be made to the defendant to allow the church-wardens and overseers to enter upon the Roehampton estate, for the purpose of ascertaining whether the boundary marks distinguishing the said parcels of land from the residue of the said Roehampton estate were in good repair, and capable of being easily distinguished.

The information then stated, that in pursuance of the resolutions, a letter was, on the 19th May, 1851, written and sent to the defendant by Evan Hare, the vestry clerk of the parish of Putney, and the solicitor for and on behalf of the said church-wardens and overseers, * which letter, so far as was material, * 117 was as follows: "Sir, As vestry clerk of this parish, will you do me the favour to fix a time that I may do myself the pleasure of waiting upon you respecting the six and a half acres of land enclosed within your estate, and belonging to this parish, and occupied by your late father, at the yearly rent of 6*l.* I dare say you would not object to the parish officers placing boundary marks to distinguish the parish land from your own, or probably you or your late father have done this; if so, it would be unnecessary."

In answer to that letter, and on the 17th June, 1851, the defendant wrote and sent to Evan Hare the following letter: "Sir,— Since my return from Brighton, I have been much occupied by pressing business in town, which has interfered with my giving you so early an answer as I had wished, and indeed as I had promised; but I was on the point of writing to you to-day when I received your note. I have made some inquiries as to the subject of your letter of the 19th of May, and from all I have been able to learn, it appears to me, that there is no person now living who can point out the exact spot upon my estate where the six and a half acres of land, if it be that quantity, are situated, and I should therefore object to any portion of the estate being marked. I believe that the fact of an annual payment of 6*l.* being due from the estate to the parish of Putney is recited in the deeds. I know that my father paid that rent, as did Mr. Gosling before him, and I have no intention of disputing that claim. I will willingly pay the 6*l.* annually; but I object to any of the ground being marked, under the circumstances of the case. I am, sir, your obedient servant, S. LYNE STEPHENS."

* On the 18th June, 1851, Evan Hare wrote and sent to * 118 the defendant another letter, which, so far as was material, was as follows: "Sir,— Allow me to acknowledge the receipt of your favour of the 17th. I regret to give you so much trouble in this matter; but it does appear to the parish officers unfair that you should refuse them the privilege of marking their own land, for the reasons stated in your letter. I think you must admit that land, in its position, is much underlet at 1*l.* per acre; may I beg

you to consider whether you will not increase the rent to a fair amount. I shall be happy to lay before the officers any proposition you may make; they are only trustees, and it is their duty to get the best rental possible for all their charitable estates."

On the 19th June, 1851, the defendant wrote and sent to Evan Hare the following letter: "Sir,—I beg to acknowledge the receipt of your letter of yesterday. I am sorry that the parish officers consider my refusal unfair; but I cannot see it in that light. Where are the six acres which they call 'their own;' and how can they mark what they cannot distinctly point out? With regard to an increase of rent, that is another question. My relation to the parish is neither that of a leaseholder nor of a tenant at will, and any increase of rent that I should submit to would entail upon the estate a permanent charge, which I must object to on principle; I have, therefore, no proposition to make to the parish officers, being quite content with my position in the matter; if they are not so with theirs, I beg to observe it is not one of my making, nor of my late father's, but rather the fault of their predecessors, and that I cannot undertake to repair it for them. As you mention that they act as trustees for charitable estates, permit me

to say, in conclusion, that I shall always be ready to contribute to the support of the charitable institutions of Putney. I remain, Sir, ever your obedient servant, S. LYNE STEPHENS."

On the 29th of September, 1851, Evan Hare, on behalf of the church-wardens and overseers of the parish of Putney, wrote to the defendant the following letter, enclosing a regular notice to quit the said parcels of land and premises: "Sir,—The parish officers are not at all satisfied with the rent you pay for the six and a half acres of parish land in your occupation, as yearly tenant. I am instructed to send you the enclosed notice to quit; I do hope that you will see the necessity of coming to an arrangement without delay either to give up the land or to pay a fair rent for it, and I assure you that my clients will be pleased at meeting you in an honorable and fair way, if you are desirous of proposing any terms."

The information then stated that the notice to quit expired on the 25th March, 1853, when the church-wardens and overseers of the parish of Putney became entitled to the possession of the parcels of land, and that they had made repeated applications to the

defendant to deliver up possession to them and to allow them to enter upon the Roehampton estate for the purpose of ascertaining and defining it by metes and bounds; but that the defendant refused to do so. The information alleged that the defendant pretended that the parcels of land never were at any time divided or distinguished, or capable of being divided or distinguished, from the surrounding lands, and that there never were any metes or boundaries by which the parcels of land could be distinguished; whereas the information charged the contrary of such pretences to be true, and that the parcels of land were originally, and when the same were first let, clearly and plainly defined and distinguished by metes and bounds, and that the persons who had * been in possession of the parcels of land and heredit- * 120 aments as such tenants from year to year as aforesaid, and in particular that the defendant and his father had, from time to time and by degrees, removed, destroyed, and obliterated, or caused to be removed, destroyed, and obliterated, the metes and bounds, and had so confounded the boundaries thereof that it had thereby become impossible for the church-wardens and overseers of the parish of Putney to distinguish the parcels of land, and the church-wardens and overseers were, therefore, unable to recover possession of the parcels of land by any proceedings at law.

The information prayed a declaration that the parcels of land, containing in the whole six and a half acres, and lying intermixed with the Roehampton estate, were subject to a charitable trust for the benefit of the church and the poor of the parish of Putney, and that the defendant might be decreed to deliver up possession of the same, and for a commission to inquire and set forth what were the parcels of land and hereditaments now in the possession of the defendant, subject to the aforesaid trusts for the benefit of the church and poor of the parish, and, if necessary, that the parcels of land and hereditaments might be conveyed to the church-wardens and overseers of the parish and their successors for the church and the poor of the parish; and that, in case it should be found impossible to define and set forth the parcels of land and hereditaments, then for an inquiry as to their value and for a commission to set out such part of the lands and hereditaments belonging to the defendant and situate at Roehampton, and being part of that estate, as should be of equal value with the parcels of land and hereditaments so comprised in the agreement

of the 1st September, 1634, and that the lands and heredit-
 * 121 aments, when so set forth, might be duly * conveyed to the church-wardens and overseers and their successors, upon trust for the church and the poor of the parish of Putney; and for an account of all the rents and profits of the land received by the defendant since the 25th of March, 1853, and that an occupation rent might be fixed on such parts of the same as had been in his possession, and that he might be decreed to pay to the church-wardens and overseers what should be found to be due upon taking such an account, and for a receiver.

The defendant, by his answer, stated that it was in evidence that the estate of the Earl of Portland was of much greater extent than that portion of it in the occupation of the defendant, and that it extended on the side of the defendant's land up to Richmond park wall, which was beyond the defendant's boundary; that, in the year 1779, part of the estate which originally belonged to the Earl of Portland was conveyed to a purchaser, and that it was agreed that the purchaser of such parts should be indemnified by the vendor against the rent of 6*l.*, which was secured to be paid out of the messuage and thirty acres of land in the possession of the defendant; that in all the deeds of conveyance from the year 1786 down to that of 1843 the property at Roehampton then in the defendant's occupation was described as being subject (*inter alia*) to an annual rent-charge of 6*l.* in exoneration of the rest of the Roehampton estate. The defendant also insisted that he was a purchaser for value without notice.

The relators failed to establish any case of removal or destruction of the boundaries of the six and a half acres by the defendant or his father. They produced, however, from among the parish muniments the account-books of the parish for a long series
 * 122 of years and the * original agreement with the Earl of Portland. An erasure appeared to have been made in the agreement, and the words "six pounds" were written over it. The parish books contained every year an entry of the receipt of 6*l.*, sometimes expressed to be for "rent of parish land," sometimes for "rent" only. The entries were not signed, but the books appeared to have been audited from time to time.

Three receipts were also produced, one dated in 1849, which was given to the defendant's father when in possession of the land, and which was expressed to be "for rent of parish land;" the

other two were of later date, and were given to the defendant after the parish had determined to raise the question, and the last of these expressed that the land was "held of the church-wardens from year to year."

The case came on to be heard before the Vice-Chancellor Wood, on the 25th July, 1855, (*a*) when his Honor held that the entries in the parish books were good evidence of the receipt by the parish of 6*l.* yearly for rent of parish land, and that the receipt of 1849, produced from the defendant's custody, estopped him from disputing the title of the parish to the specific land alleged by the information to be in his possession, and that under the circumstances of the case there was a duty imposed upon the defendant and his predecessors in the estate to have kept such lands distinct. By the decree it was declared, that the several parcels of land mentioned in the memorandum of agreement of the 1st of September, 1635, signed by the Earl of Portland, and therein stated to contain by estimation six and a half acres and to be lying within the new park and several grounds of the Earl of Portland, at Roehampton, were subject to a charitable trust for the benefit of the church and the * poor of the parish of Putney; and * 123 it was also declared, that the lands comprised in the memorandum of agreement were the same as those in respect of which the defendant and his father paid the rent of 6*l.* a year for rent of parish land. A commission was directed to issue, to inquire which were the parcels of land then in the possession of the defendant and lying intermixed with his lands at Roehampton, which were subject to the trust as being the parcels mentioned in the agreement, and the commissioners were to set out the same by metes and bounds accordingly. And if by reason of the confusion of boundaries or other circumstances the commissioners should not be able to distinguish within the lands held by the defendant the particular parcels of land subject to the trust, or any one or more of them, then they were to set out such quantity of the lands then in possession of the defendant at Roehampton as might be of equal value with the charity lands, or so much thereof as could not be distinguished or ascertained.

From that decree the defendant now appealed to the Lord Chancellor.

(*a*) 1 K. & J. 724.

Mr. Rolt, Mr. James, and Mr. Selwyn, for the information in support of the decree of the Vice-Chancellor. — The defendant in the present case cannot be in a better position than the heir of the Earl of Portland, who was confessedly only a tenant, and, as such, he ought to have preserved the boundaries; but, having permitted them to be confused so that they cannot be distinguished and specifically restored, he is bound to substitute land of equal value, or the value of such land must be ascertained by a commission, as ordered by the decree of the Vice-Chancellor. *The Attorney-*

* 124 *General v. Fullerton.* (a) They relied upon the cases of *The Attorney-General v. Pilgrim*, (b) and *The Attorney-General v. Pembroke Hall*, (c) *Attorney-General v. Hall*, (d) to show that even where there had been a grant of long leases virtually amounting to a sale, such leases were not binding on the Attorney-General. On the admissibility of the entries in the parish books relating to the receipts they referred to *Doe d. Patteshall v. Turford*, (e) *Doe d. Webber v. Lord George Thynne*, (g) *Short v. Lee*, (h) *Poole v. Dicas*, (i) *The Mayor of Exeter v. Warren*, (k) and Phillips on Evidence, Vol. I. pp. 316–318, ed. 9.

The Solicitor-General, Mr. Cairns, and Mr. Hobhouse, for the defendant in support of the appeal. — The equity asserted by the information is that there has been a confusion of boundaries, and that the defendant is in possession of the identical lands originally demised, but there is a complete failure of any proof that the parish have a legal right to any lands in the possession of the defendant, a state of circumstances which must exist to justify such an information. *The Duke of Leeds v. The Earl of Strafford*, (l) *Godfrey v. Littel*, (m) *Grierson v. Eyre*, (n) *Speer v. Crawter*, (o) *Miller v. Warmington*. (p) The only foundation for the equity asserted by the bill is the memorandum of agreement signed by the Earl of Portland on the 1st of September, 1635; but that is even according to the Vice-Chancellor an ambiguous instrument,

(a) 2 V. & B. 263.

(b) 12 Beav. 57.

(c) 2 S. & S. 441.

(d) 16 Beav. 388.

(e) 3 B. & Ad. 890.

(g) 10 East, 206.

(h) 2 J. & W. 464.

(i) 1 Bing. N. C. 649.

(k) 5 Q. B. 773.

(l) 4 Ves. 180.

(m) 2 R. & M. 630.

(n) 9 Ves. 345.

(o) 2 Mer. 417.

(p) 1 J. & W. 484.

and would rather convey the impression that the earl had an *intention of acquiring, if he could, the ownership of *125 the lands himself, on condition of paying a fee farm rent, to be charged on other property of greater value. We submit, therefore, that not only is the agreement consistent with our contention, but that the entries in the parish books, so far as they profess to be receipts for rent, are also consistent, but in so far as they profess to be for "parish land" they are clearly inadmissible. They are not signed, and clearly do not warrant the assumption which the Vice-Chancellor has made, and the doctrine as to deeds more than thirty years old proving themselves is inapplicable to mere writings not under seal. The plaintiffs have relied upon the case of *The Attorney-General v. Pilgrim*, (a) to show that this Court will not after the lapse of any length of time sanction an alienation of charity property, but that case falls very far short of supporting the plaintiffs' view, for Lord LANGDALE there says that "there may be circumstances which would fully justify the alienation of charity property;" and it is to be observed, that in that case the bill was expressly filed for the purpose of setting aside the lease as an improvident one, whereas in the present information there is not only no allegation of any improvidence on the part of the parish in the year 1634, nor, consequently, does the information seek to impeach the agreement on that ground; but there is abundant evidence to show that it was originally an advantageous arrangement for the parish; under such circumstances the Court will presume either an Act of Parliament or a grant coexistent with the uninterrupted enjoyment of the land. *Stafford v. Llewellyn*, (b) *Eldridge v. Knott*, (c) *The Mayor of Kingston-upon-Hull v. Horner*, (d) *Lopez v. Andrew*, reported in a note to *Rowe v. Brenton*, (e) *Roe d. Johnson v. Ireland*, (g) *Chambers v. Bernasconi*, (h) *Mayor of Exeter v. Warren*. (i) But further, we rely on the fact that the charity have had the benefit for upwards of 200 years of an exorbitant rent. Upon this head, as well as on the ground that the information does not seek to impeach the original transaction, the observations of Sir WILLIAM GRANT, in the case of *Attorney-General v.*

(a) 12 Beav. 57.

(b) Skinner, 77.

(c) Cowp. 214.

(d) Cowp. 102.

(e) 3 Man. & Ry. 329.

(g) 11 East, 280.

(h) 1 Cr. & J. 457.

(i) 5 Q. B. 773.

Warren, (a) are most important; he there says, "Length of time, though not a bar, is certainly an obstacle in the way of setting aside a contract made near a hundred and fifty years ago, and acted upon ever since till the filing of this information. It creates a difficulty in ascertaining all the circumstances under which the agreement was made, and a strong case is required to justify the interposition of equity after such a lapse of time, at the instance of one of the parties who may have enjoyed all the benefit of the contract for perhaps the whole or a great part of the interval, and who never could have been compelled at the instance of the other party to relinquish it when, from an alteration in the relative value of money, the agreement has become disadvantageous to him. It is additionally difficult in such a case partially to set aside the contract, leaving the charity still to enjoy all the benefits of the other part of the transaction; and yet the information neither seeks nor is properly framed, nor has the necessary parties, for a complete rescission of the whole agreement and a restitution of both parties to their original rights as they stood antecedent to the formation of it." The mere fact that by an alteration of circumstances, which clearly was not in the contemplation of either the trustees for a charity, or the lessees, the lands once leased have become more valuable, will not affect the lease; and it may

happen that the purpose of the charity may be best sustained and promoted by alienating the * specific property.

* 127 *Attorney-General v. Hungerford*, (b) *The Attorney-General v. The South Sea Company*. (c) With respect to that part of the decree which directs a commission to issue to inquire what are the parcels of land now in the possession of the defendant subject to the trusts, and, if the commissioner should be unable to distinguish the particular parcels, to set out such a quantity of the defendant's land as may be of equal value,—it is obviously the most preposterous direction, involving in effect an inquiry by the commissioners as to the value of an unknown quantity, by reference to another quantity which *ex concessis* is also unknown; because there is in truth no evidence as to what were the metes and bounds of the particular lands, there being only the fact that the Earl of Portland was in 1634 possessed of a whole park of 350 acres, and that the six and a half acres included in that belonged to the parish

(a) 2 Swanst. 291; see p. 305.

(c) 4 Beav. 453; see p. 458.

(b) 2 Cl. & Fin. 357; see p. 374.

of Putney; and the Vice-Chancellor's own conclusion is, "that no portion, or only a small portion, of the parish land" was held by the defendant. (a) But assuming for a moment that the particular six and a half acres are in the possession of the defendant, and that the plaintiffs could succeed without seeking to impeach the original agreement, still we contend that they are not entitled to the relief sought against the defendant, because all the other part-owners of the original park are not before the Court. With respect to the receipts by the defendant and his father, the Vice-Chancellor said he could not conceive a stronger admission than a receipt, a document which is the discharge of the person who takes it, as evidence of the character he made the payment for which it is given: and then relied upon the case of *Hitchings v. Thompson* (b) as affording * grounds for presuming * 128 a tenancy, and that after such acknowledgment the defendant would be estopped from denying the right of the landlord. But we submit that no such inference necessarily follows; though assuming that it does, still the plaintiffs must show how the parish has been damnified.

[The Lord Chancellor intimated his opinion that it would be a question for the jury.]

The defendant is a purchaser for value without notice, and there is no evidence whatever by which he can be affected with constructive notice: *Ware v. Lord Egremont*, (c) *Jones v. Smith*, (d) *Attorney-General v. Wilkins*; (e) but the Vice-Chancellor has disregarded that defence by drawing an unwarrantable conclusion from the receipts taken by the defendant and his predecessors in the estate for the payment of 6*l.* a year, observing that the first question of a purchaser would be, "Let me see the last receipt of the rent-charge, and if the purchaser had seen any one of these receipts, he would have discovered that it was not a rent-charge, but a rent of parish land," and that such would be evidence of a tenancy. But where, as in the present case, there is a fee farm rent, there is no object in asking for the production of the last receipt, which is only called for in case of leaseholds, to show that

(a) 1 K. & J. 745.

(b) 5 Exch. 50.

(c) 4 De G., M. & G. 460.

(d) 1 Hare, 43.

(e) 17 Beav. 285.

if any covenants have been broken, the breach has been released. The letter of the 19th May, 1851, addressed by order of the church-wardens to the defendant, asking him to deliver up possession of the land, and also to allow them to enter upon the land for the purpose of ascertaining and defining the boundaries, was concocted with the view of entrapping the defendant into an admission.

They also referred to the abstract of returns of charitable donations, 1786, 1788, to show that there was a gift, under the *129 head "land," of 6*l.* a year rent-charge to *the parish of Putney, and that it was expressed to be unknown whether such gift was by will or deed; and they relied upon the Statute of Limitations.

Mr. Rolt, in reply. — The authority of *Speer v. Crawter* (a) and the other cases cited to prove that the information in circumstances like the present should show a legal title, also establish that it was the duty of the tenant to preserve the boundaries; and if it can be proved, as is manifest, both from the original agreement of 1634, and also from the entries in the parish books ever since, that the lands have been uniformly described as parish lands, the whole of the defendant's argument fails. It was said that there is no evidence that the particular six and a half acres are now in the possession of the defendant, but the inference from the payment of rent is irresistible that they do constitute part of the lands now held by him. With respect to the entries in the parish books, and the language of the receipts, it is to be observed, that such entries were all so many additional particulars on account of which the money is alleged to have been received, and are, therefore, so many additional charges on the person making the entries, and their value therefore enhanced. *Barry v. Bebbington*. (b) This is very different from the cases cited in the note to *Price v. The Earl of Torrington*, (c) which establish that collateral matter appearing on an entry is inadmissible; Phil. on Evid. Vol. I. pp. 293 et seq. ed. 9. The letter of the 19th May, 1851, so far from being a trap was a clear assertion of a right on the part of the parish authorities, and the answer to it by the defendant amounted to an ad-
*130 mission of all that the information seeks to establish, *be-

(a) 2 Mer. 410.

(b) 4 T. R. 514.

(c) 1 Smith's Lead. Cas. 235, ed. 4. [5th Am. ed. 390 et seq.].

cause it affords ample proof, if proof were wanting, of the necessity for filing the present information, namely, that the boundaries are confused. The defendant also relied on the defence of being a purchaser for value without notice, but the parish, not being parties to the purchase deed under which the defendant holds, cannot be affected by it, to say nothing of the receipts whereby the defendant must have had notice that part of the land purchased belonged to the parish. As to the evidence which was attempted to be used from the report of the charitable commissioners, that is clearly inadmissible; they could only have procured any information from the parish books. It is not controverted that there are authorities for holding that a grant or an Act of Parliament may, under certain circumstances, be presumed; but in the present case such presumption is rebutted by the fact of the continuous payment of and receipts for rent in respect of parish land, which is entirely inconsistent with any grant or Act of Parliament. *Weld v. Hornby*; (a) Phil. on Evid. Vol. I. p. 347, ed. 9.

[THE LORD CHANCELLOR. — It could hardly be presumed that the Earl of Portland would have taken in six and a half acres of land into his park, with the continuing liability of their being taken away at any time.]

It was said that the information was framed in error, because it did not seek to impeach the alienation, but the obvious answer is that there never was any alienation. The Statute of Limitations has no application where, as in the present case, the tenancy is established by the payment of rent and acceptance of receipts.

December 31.

THE LORD CHANCELLOR. — This was an information filed by the Attorney-General at the relation of the church-wardens and overseers * of the parish of Putney, against Mr. Stephen * 131 Lyne Stephens, who is the owner in fee-simple of a house and grounds at Roehampton, a hamlet of the parish of Putney. Its object is to recover from the defendant six and a half acres of land alleged to be or to have been held by him as tenant of the

(a) 7 East, 195.

parish at a yearly rent of 6*l.*, the tenancy having been duly terminated by a notice to quit, served on the 29th of September, 1851. The case made by the information is as follows:—

Among the parish documents and muniments of title there exists an old paper purporting to be under the hand and seal of the Earl of Portland, but not in fact sealed, though it bears the signature “Portland.” It is dated the 1st of September, in the eleventh year of the reign of King Charles the First, *i.e.* the 1st of September, 1635, erroneously represented in the information as 1634, and it is in these words: [His Lordship here read the agreement (*ante*, p. 113), and proceeded.] In the parish book of the following year, 1636, is a description or terrier of the lands so taken, or alleged to have been taken, by the earl into his park, and this terrier is signed by fifteen persons, probably parishioners, including Richard Avery, who is called clerk, and who, therefore, was most likely the incumbent of the parish.

On behalf of the parish officers, the relators in this information, it is contended, that in and prior to 1634 the six and a half acres of land so taken by the Earl of Portland into his park, were vested in some trustee or trustees for the parish in trust for the church or the poor, or both, and that under the agreement of the 1st September, 1635, the Earl of Portland became tenant of these lands to the parish, either at will or from year to year, at a yearly rent of 6*l.*; that ever since 1635 this tenancy has been recognized by all succeeding owners of the park, including the defendant’s late father, who * purchased it in 1842 or 1843, and the defendant himself, who succeeded to it on the death of his father in 1851.

The relators make out their title thus: They state who were the successive owners of the property of the Earl of Portland from the year 1634 to the present time, and then they show from the parish books, which are perfect from that date, that in every year, or almost every year, the successive church-wardens and overseers charged themselves with the receipt of this annual rent of 6*l.* In the two years immediately following the agreement with the Earl of Portland, the entry in the parish books expressly states the 6*l.* to have been received from the Earl of Portland for a year’s rent for six acres of land taken into his new park. From that time onwards, the receipt of the 6*l.* is variously described, sometimes as for land in the park, sometimes as for rent of church land, some-

times as rent of parish land, and often merely as rent. But however described, the relators contend it is obviously the same payment for the same land; and, as it was always regularly made by the persons who were the successive owners of the property formerly held by the Earl of Portland, the inference, it is argued, is irresistible, that the tenancy originally created in 1634 or 1635 was continued during all the successive ownerships till it became vested in the defendant's father, and, on his death, in the defendant himself. Acting on this principle, the relators, at Michaelmas, 1851, gave notice to the defendant to quit the six and a half acres of land in question, at Lady Day, 1852. And so at that time, if they are right in their contention that a tenancy from year to year has all along been subsisting, they certainly became entitled to resume possession, and they, or rather the trustee in whom the fee is vested, or if, as is probable, no such trustee could be found, then a trustee to be appointed by this Court, might maintain an ejectment. But in * order to enable them effectually to * 133 sustain such an action, it is essential that they should know where the six and a half acres are situate, what were the lands demised. The information alleges that this has been rendered impossible, by reason of the wrongful acts of the defendant and his father, and the other persons who have from time to time been in possession of the land in question; for that instead of preserving, as it was their duty to do, the metes and bounds of the demised parcels of land, so that those parcels might at all times be readily distinguished from the lands with which they lie intermixed, the boundaries have been from time to time by the successive owners of the adjoining lands gradually obliterated or removed, so that it is impossible for the parish now to recover, by any proceedings at law, possession of the specific parcels of land demised.¹

The information therefore prays the assistance of this Court, asking for a commission to inquire what are the lands in the possession of the defendant subject to the above-mentioned trusts for the benefit of the church and poor of the parish of Putney, *i.e.* what part of the lands in possession of the defendant constitute the six and a half acres of land originally demised to the Earl of Portland, or, if it be impossible to ascertain this, then that a com-

¹ See 2 Dan. Ch. Pr. (4th Am. ed.) 1163, 1164, and notes; *Wake v. Conyers*, 2 Lead. Cas. in Eq. (3d Am. ed.) [370], [371].

mission may issue to set out such part of the defendant's land at Roehampton as shall be of equal value with the six and a half acres originally demised, and that the same may be conveyed to or in trust for the parish.

The relief thus asked is founded on misconduct analogous to a breach of trust on the part of the defendant, or those to whom he has succeeded. Where a tenant of land for life or for years or at will has land of his own adjoining to that which he so holds as

tenant, it is his duty to keep the boundaries between them
 * 134 clear and distinct, so that, at the expiration * of the tenancy, the reversioner or remainder-man may be able without difficulty to resume possession of what belongs to him; and if the person having such partial interest neglects this duty, and suffers the boundaries to be confused, so that the reversioner or remainder-man cannot tell to what land he is entitled, this Court will give relief, by compelling the person who has occasioned the difficulty to make good, out of what may be considered to be in the nature of a common fund, that portion of it which belongs to another. The party guilty of the neglect has land, a portion of which, *ex concessis*, belongs to another. He has, by his neglect of duty, made it impossible to ascertain the particulars of which that portion consists, and this Court then steps in and compels him to make good an equivalent, as near as may be, out of that which clearly includes what, but for his default, might have been taken from him by legal proceedings. This relief is given not only against the party guilty of the neglect, but also against all those who claim under him, either as volunteers or as purchasers with notice.

It is on the doctrine which I have thus stated that the relief asked for in this information rests; and the question to be considered is, whether the facts necessary to sustain a title to this relief are made out in proof. I think they are not. I will for the present assume that the relators are right in saying that the document of 1635 created a tenancy from year to year in the Earl of Portland, and that they have satisfactorily shown the subsistence of that tenancy up to Lady Day, 1852, when it terminated, and the right of the parish to resume possession accrued. This, if the lands which had been demised had remained capable of being distinguished, might have enabled the parish or their trustee to have maintained an ejectment; but in order to induce the Court to give

the relief sought by this information, it is incumbent on the * relators to show that the defendant is in possession of the * 135 land included in the original demise, *i.e.* that the six and a half acres form part of his Roehampton estate.

If the owner in fee-simple of an estate consisting of Blackacre and Whiteacre were to take a lease of land lying interspersed in Blackacre, and were improperly to confuse the boundaries between those lands and his own, and afterwards Blackacre and Whiteacre should pass into the hands of distinct purchasers, if, at the termination of the lease, it should have become impossible to distinguish the interspersed lands, there certainly would be no equity against the owner of Whiteacre to compel him to provide an equivalent out of his estate.

It is necessary, therefore, to see whether the relators have shown the defendant to be, according to the allegation of their information, in possession of the six and a half acres. The information states that which, if proved, would certainly establish the fact beyond all doubt. For it states that these pieces of land were originally mixed up with the lands of the Earl of Portland called the Roehampton estate, of which in fact they formed a part, and that that estate, *i.e.* the whole of it, passed through the hands of various successive owners, all of whom, above twenty in number, are named in the information, until eventually, in 1842, it was purchased by the defendant's father, and on his death passed to the defendant, his son. If this allegation had been established, — if it had been shown that the Roehampton estate, *i.e.* the whole of it, had become the property of the defendant, — inasmuch as that estate comprised the lands in question, the relators would have established their point, but this they have not proved. On the contrary, it is certain that the defendant possesses only a small part of that which formed the Roehampton estate at the time when the six and a half acres of land * were taken * 136 into the park; and therefore, though it is possible that his property may include that land, it is certainly also possible, and much more probable, that it does not.

An attempt is indeed made by the evidence of Mr. George Potton Dyke, and of a man named Sims, to connect a portion of the defendant's land with the description in the old terrier, but that attempt wholly fails; and I think it must certainly be taken that there is no direct proof showing any part of the parish land to be

included in the defendant's estate. This, indeed, was not controverted, or barely controverted, by the counsel for the relators, but what they argued was that, whatever the fact might be, yet the defendant is estopped from saying that he does not hold the land in question, inasmuch as he and those under whom he derives title have for a long series of years paid rent for that land to the parish; and so that the defendant is precluded from saying that he does not hold the land for which he has thus paid rent. This is the view of the case taken by the Vice-Chancellor, and is, therefore, entitled to great consideration; but I confess that I am unable to concur with his Honor in the conclusion at which he has arrived on this point.

In order to make the payment of this yearly rent of 6*l.* operate as an estoppel, so as to prevent the defendant from disputing the fact that the six and a half acres of land in question form part of his estate, it is essential to make out that the payments have been from time to time made by him and his predecessors as for rent due from them for land of which they were tenants, — *Quicquid solvitur, solvitur secundum animum solventis*; and if, on looking to the facts of this case, it is plain that the payments have been made (*secundum animum solventium*), not for rent, but on another

* 137 account, the doctrine of estoppel arising from * payment of rent has no place. Now, looking to the evidence before me, I think it clear that none of the persons by whom these payments have been made had any notion that they were tenants of parish land. They paid the 6*l.* because according to the terms of their title-deeds they were bound to exonerate the whole of what originally constituted the Roehampton estate from that which they supposed to be a rent-charge of 6*l.* issuing out of the whole. This appears to me plain from the defendant's title-deeds as set out, and, it was admitted at the bar, correctly set out, in his answer. From those deeds it appears that in 1690 the Roehampton estate, described as containing 350 acres, was conveyed by the Earl of Devonshire to the Countess of Northumberland, and there was the usual covenant against incumbrances, except a rent-charge in fee of 40*l.* per annum, payable to trustees for the use of almspeople of Putney for ever, and one other yearly rent of 6*l.* payable to the poor of Putney aforesaid for ever, and two other rents of 10*l.* and 1*l.* payable to the lord of the manor of Wimbledon. Between 1690 and 1775 the estates frequently changed hands, and in the

latter year became vested in Thomas Parker in fee. In nearly all the conveyances which were made on transfers of the property during that period of eighty-five years, there was an exception in the covenant against incumbrances, similar to that contained in the deed of 1690. In 1779, Thomas Parker sold a part of the estate to a person named Brooksbank. The conveyance to him refers to the two annual sums of 40*l.* and 6*l.*, and the two annual rents of 10*l.* and 1*l.* as affecting the whole estate, and makes provision for indemnifying him against those payments, by charging them exclusively on a portion of the estate not sold to him, *i.e.* on a messuage and thirty-one acres of land, described as then in the occupation of Joshua Vanneck. Two other portions of the Roehampton estate were in the year 1784 sold by Parker to * other purchasers with the same indemnity as in the * 138 conveyance to Brooksbank. In 1786, Parker sold to Joshua Vanneck, *inter alia*, the messuage and thirty-one acres of land which were so in his occupation. The conveyance to him recites a deed of 1648, whereby the Roehampton estate, containing 350 acres, was charged with an annuity of 40*l.*, payable to the almsmen and women of Putney for ever; and then reciting that the said hereditaments were also charged with another annuity of 6*l.*, payable to the poor of the parish of Putney aforesaid for ever, and with two rents of 10*l.* and 1*l.* payable to the lord of the manor, and reciting the three conveyances of parts of the property so charged, and the arrangement by which the said rent-charges or annuities were made chargeable on the lands so occupied by the said Joshua Vanneck; it is witnessed, that Parker and his trustee conveyed to Vanneck and his heirs (*inter alia*) the messuage and thirty-one acres so in his occupation, but subject to the said annual rent-charges of 40*l.* and 6*l.* to the poor of Putney aforesaid, and to the said two rents payable to the lord of the manor.

Several sales and conveyances of the property so conveyed to Vanneck afterwards took place, and ultimately, in 1842 or 1843, the defendant's father became the purchaser. It would seem that he purchased in 1842, but that the conveyance was only made to him in 1843. In all the deeds of conveyance from 1786 downwards, the property is described as being subject to the said two annual rent-charges of 40*l.* and 6*l.* and the said two rents of 10*l.* and 1*l.*, in exoneration of the rest of the Roehampton estate. In this state of things, assuming it to be clear that the defendant and

all his predecessors, up to Joshua Vanneck the purchaser in 1786, regularly paid the 6*l.* annually to the parish officers, I think
 * 139 the inference is irresistible, * in the absence of any explanatory circumstances, that the payment was made by reason of the obligation to which on the face of the deeds the lands appeared to be subject, and not because the persons making the payments supposed that they held land as tenants of the parish. I can hardly suppose that on this point any one can entertain a doubt, — I mean a doubt as to the fact of what the persons paying the 6*l.* supposed the nature of the payment to be.

But then it was argued that it was not open to the defendant to make his own title-deeds evidence in his own favour. The parish books, it was said, are public documents, and the entries made in them, showing receipts by deceased accounting parties, are on well-established principles evidence not only of the receipt of the money with which the accounting parties charge themselves, but also on what account it was received. This is no doubt true.¹ But, after all, such entries are but evidence; they do not conclusively establish the facts for which they are produced, so as to exclude other evidence which may raise an inference contrary to that suggested by the entries; and the question is whether in this case the title-deeds of the persons making the payments may not lawfully be looked at for such a purpose. The relators contended that they could not, that they were *res inter alios*, to which the parish was no party, and had no access. But to this reasoning I cannot accede.

The title-deeds of a person seised of land are certainly not in general admissible in evidence against third persons to prove the truth of facts which they assert. But it is not for the purpose of proving any fact that the deeds are in this case offered in evidence, — not to prove that in fact the 6*l.* was due for a rent-charge, and not for rent of land in the occupation of those who made the payment, but to show what their intention in making that payment probably was. It may be that the view they took of
 * 140 * their rights and liabilities was quite wrong, and they could not for the purpose of establishing their rights derive aid from their own muniments of title; but for the purpose of showing what they supposed these rights and liabilities to be, the deeds are

¹ See 1 Greenl. Ev. §§ 151–154.

clearly admissible. Suppose one of the persons thus entitled had written a letter to his banker, stating that his estate at Roehampton was bound to indemnify some other adjoining lands against a rent-charge of 6*l.*, payable to the parish of Putney, and charged as well on his own lands as on those to be indemnified; and, therefore, desiring the bankers to pay 6*l.* to the bankers of the parish at Lady Day every year; this, though no evidence as to the fact whether the 6*l.* was a rent-charge or a reserved rent for parish lands in his occupation, would be cogent, and indeed almost irresistible, evidence to show on what account he meant to pay the 6*l.*, *i.e.* to prove what was the *animus solventis*. The fact that the title-deeds state such a liability is certainly evidence to the same effect, and it is evidence which to my mind entirely neutralizes the effect of the payments to the parish, so far as they are relied on as showing that the defendant and his predecessors have admitted themselves to be occupiers of land held of the parish.

But independently of the evidence of possession derived from the mere payment of the 6*l.*, the relators relied on the fact that among the defendant's muniments of title there is a receipt given to his father for the 6*l.* which became payable at Lady Day, 1849. The receipt is in these words: —

“Parish of St. Mary, Putney; received the 27th April, 1849, of C. L. Stephens, esquire, the sum of 6*l.* for one year's rent of parish land, from Lady Day, 1849, to Lady Day, 1850. Signed JAMES MILLER, *Collector*.”

The argument was that the acceptance by the defendant's father of this receipt shows that he admitted *himself to be * 141 tenant of some parish land, which could be no land but that now in question. And great reliance was placed on the case of *Hitchings v. Thompson*. (a) But that case, when rightly understood, does not help the present relators. It was an action of replevin on a distress for rent of a house at Bristol. The defendants avowed for rent in arrear, alleging that the plaintiff was their tenant of the house in question. The plaintiff pleaded in bar, *non tenuit*. It was, therefore, incumbent on the defendants to make out that the plaintiff was their tenant. In order to do this, they

(a) 5 Exch. 50.

showed that on the marriage of one Clarke, the owner of the house, it was conveyed to Ward and Baynton as trustees of his marriage settlement then executed. The plaintiff, who occupied the house in question, regularly paid his rent to Daniel Horwood, who acted as agent of the trustees, and a receipt was always given in the following form:—

“Received for the trustees of Mr. and Mrs. W. Clarke of Mr. Hitchings 5*l.* 5*s.*, being for half a year’s rent for the house and premises situate in the parish of St. Philip and Jacob, Bristol, due, &c.
DANIEL HORWOOD.”

It was proved that a conveyance of the lands was executed to the defendants, not, however, by Ward and Baynton, but by Ward and a gentleman named Newman. It was argued that this afforded proof of title in the defendants, who did not show any conveyance from Ward and Baynton, but only from Ward and Newman, who alleged but did not prove that the property had been conveyed to them by Ward and Baynton. It was, however, proved that Horwood had in fact received the rent as agent for, and had paid it over first to Ward and Baynton, as the trustees,

and afterwards to Ward and Newman, as trustees in their
* 142 place, and the Court held * that this payment of rent was evidence which ought to have been laid before the jury tending to prove title in Ward and Newman, and, therefore, tending to prove title in the defendants, who derived title under Ward and Newman. Payment of rent to the person who was in fact the agent of Ward and Newman was some evidence of their title, and, therefore, ought to have been submitted to the jury, though liable to be rebutted by proof that the payment was made in ignorance or mistake, that though in fact paid to Ward and Newman through Horwood, as their agent, the tenant had intended to pay it to Ward and Baynton. This is clearly put by Baron PARKE, who, in his judgment in that case, says: “It has been urged, on the part of the plaintiff, that Mr. Horwood did not inform the plaintiff upon whose account he received the rent. If, however, Ward and Newman had distrained for rent, the receipt of previous rent by Horwood, as their agent on their account, would be some evidence of their title, although he did not disclose their names to the plaintiff. Here there is some evidence that Ward and Newman were

entitled to the rent, and the question is whether the fact that the plaintiff had paid rent to Ward and Baynton makes any difference. That only affects the weight of the evidence, for it was competent to the plaintiff to have shown that the payment had been made upon the supposition that it was to go to Ward and Baynton, to whom it had been paid before, since every payment which is made by a tenant under a mistake or in ignorance of the party's title to whom he has paid it may be shown by him to have been so made. The plaintiff might dispute the fact of the assignment of the reversion as having been made by fraud. Upon the proof of the payment to Ward and Newman, the plaintiff would be at liberty to show that Ward and Baynton were the persons he intended to receive it."

That case cannot, therefore, show more than that the * payment proved, so far as it is proved by the receipt of the * 143 27th April, 1849, is a matter affording some evidence that Mr. Stephens acknowledged himself to be the occupier of land holden of the parish ; but giving it the fullest weight to which it could in any circumstances be entitled, I think it is altogether insufficient to countervail the inference necessarily to be deduced from the contents of the title-deeds. There is no evidence whatever to show what passed when the receipt was given, or to show that Mr. Stephens's attention was drawn to the particular words in which it was couched. And, indeed, after all, considering that Mr. Stephens was not a lawyer, I doubt whether he would understand that the expression "rent of parish land" would not be the appropriate mode of describing the rent-charge which he would suppose himself to be discharging.

There was another piece of evidence on which reliance was placed by the relators as showing that the defendant is, or at all events that he is estopped from saying that he is not, in possession of the six and a half acres of land, — I allude to the letters which passed between him and Mr. Hare, the vestry clerk, in 1851, soon after the death of the defendant's father. It seems that about this time the parish resolved to assert the title now insisted on by the present information. The letters which passed are set out in paragraphs 12 and 13 of the information — [His Lordship here read them (see *ante*, p. 117), and proceeded.] The defendant, it is said, by these letters expressly admitted his tenure of the land in question, and from that admission he ought not to be allowed

to withdraw. I do not take this view of what then passed. I cannot altogether approve of the course then taken by Mr. Hare: it was not dealing fairly with the defendant to write to him a letter,

in which it is assumed as an undisputed fact that he was
 * 144 holding six and a half acres of land as tenant to * the parish.

It looks very much as if there was a wish to lead the defendant into an admission of what Mr. Hare must have known was at least very doubtful. The defendant's answer, though putting his objection on the ground, not that he held no land as tenant of the parish, but that no one could say where that land was situate, yet refers to his title-deeds as showing what the nature of the payment was, and that all he was liable to was an annual payment of 6*l*. He was, I think, right in his notion that he was liable only to an annual payment of 6*l*., though he rested his case on a wrong foundation. It was a mistake into which a gentleman in his situation was very likely to fall, and I can give no weight to the suggestion that it at all misled the relators as to the nature of their rights.

In the course of the argument it was suggested, that as the estate of the defendant is at all events bound to indemnify the owners of the other parts of the Roehampton estate, it must be indifferent to him whether he is or is not the actual tenant of the scattered lands as being enclosed in his portion of that estate. But this is a mistake. The defendant's estate is not bound to indemnify against the claim now set up, but only against a yearly payment of 6*l*.; and that the defendant has always been willing to do.

Inasmuch; therefore, as in order to sustain the case of the relators it was incumbent on them to show possession by the defendant of the land in dispute, and as they have, in my opinion, wholly failed to do this, the information must necessarily be dismissed. How the case would have stood if the information had brought before the Court as defendants all the persons now being the owners of the whole of the Roehampton estate, I need not stop to inquire. That is not the case now before me.¹

But there are some other points to which I think it
 * 145 * right to advert. In the first place, though I have assumed that the relators have shown seisin of the land by means of the parish books, in which the parish officers have regularly

¹ See 1 Dan. Ch. Pr. (4th Am. ed.) 209.

charged themselves with the receipt of the rent, yet on this point the evidence is very defective. Such entries are only receivable as a medium of proof when the persons so debiting themselves are dead, and therefore unable to state the facts and circumstances connected with the payment. It is a species of evidence admissible only from the necessity of the case, to reject which would be to reject that which must in general be the only sort of proof at all accessible as to what has occurred long ago. But when the question is as to what has been done recently, when the person or agent paying or the person or agent receiving, or both, is or are alive, the safe and only mode of proving payment is by the testimony of those who were parties to or conusant of the transaction, and who are aware of all which may have passed. It would be absurd to require proof that those who made the entries in the parish books in the seventeenth or even in the eighteenth century are not now alive and so capable of themselves speaking to the payments which they have recorded; but certainly the same thing cannot be said of entries made within the last twenty, thirty, or even forty years. As to these it would have been most material to have had information as to the manner and circumstances of payment, and the entries are certainly not admissible in evidence without first showing that the persons who made them are dead.¹

For nearly fifty years, *i.e.* from 1796 to 1843, the payments were made by the then owners of the estate, — now belonging to the defendant, — Messrs. Gosling, who were, I suppose, the well-known bankers. And if it should turn out that these payments were annually made on a fixed day by a mere payment from one * banking firm in London to another, very little infer- * 146
ence could safely be made from such payments as to the precise nature of the demand they were intended to discharge. As the case now stands, there is no proof whatever of the modern payments, and the reasonable inference against the parish is that these payments were not so made as to afford material evidence in support of what is contended for by the relators in this information.

These observations go not only to the subject on which I have already remarked, namely, the want of adequate proof of possession by the defendant of the lands in dispute, but also to another very important point. The defendant insists, by his answer, amongst

¹ See Stark, Ev. (8th Am. ed.) [480], 433 *et seq.*

other grounds of defence, on the Statute of Limitations. This defence must wholly fail if the relators can show that within the last twenty years the title of the parish has been recognized by payment of rent. The Statute 3 & 4 Will. 4, c. 27, § 8, enacts, that when any person shall be in possession of any land as tenant from year to year without a lease in writing, the right of the reversioner to bring an action to recover the land shall be deemed to have accrued at the last time when any rent, payable in respect of such tenancy, shall have been received. Where the tenancy is, as in this case, disputed, the circumstances connected with the annual payments are evidently most important, for if the person paying made the payment expressly or impliedly on account of something else than rent of land of which he was the tenant, this would not be a payment of rent within the meaning of the clause to which I have referred. It is therefore manifestly most important to know all the circumstances which have attended the annual payments of 6*l.*, which have been made for the last twenty years, in order to enable us to come to a fair conclusion on the point

whether they have been payments of rent in respect of the
*147 tenancy now insisted on ; for, if not, the defence * founded on the Statute of Limitations is a complete bar. It thus appears, that in insisting on having these payments proved by living witnesses, so far as is possible, the defendant would not be struggling on a mere matter of form. The objection that such witnesses have not been examined is of a very substantial character.

Another defence insisted on by the defendant is, that he is a purchaser for valuable consideration, and without notice. It is not necessary for me here to say that the facts in proof would bear out this defence. But I must guard myself against being supposed to be satisfied that they would not. What passed on occasion of the purchase from Mr. Gosling does not appear in proof ; but I will suppose, as would probably be the fact, that the purchaser's conveyancing counsel asked of the vendors' solicitor or counsel what was the origin of the charge ? The answer would or might be, " We are unable to tell you. It has always been paid, and on the numerous changes of property which have occurred since our first title-deed, when the Countess of Northumberland purchased from the Earl of Devonshire in 1690, it has always been noticed as one of four annual charges affecting the estate." This would very probably have been the answer. The

Vice-Chancellor Wood, from whom I never differ without feeling a distrust of my own judgment, says on this, that the first observation of a purchaser would be, "Let me see your last receipt," and on that being produced, it would appear that the payment was made not for a rent-charge, but as rent of parish land. Now, speaking with all respect, I doubt whether, considering the position in life of the vendors, it is at all certain that a purchaser would have thought of asking to see the last receipt. He might not unreasonably rely on the assurance of the vendor, or rather of his solicitors, that they * could give no account of * 148 the payment beyond what was to be gathered from the title-deeds, and he would assume that Messrs. Gosling would clear off all arrears before they sold to him, or would make an allowance for any arrears remaining unpaid. Indeed, it appears to me very doubtful, whether any receipts were ever given prior to the year 1843, for in that year there is for the first time a deduction in the parish books for a receipt stamp; and I rather infer that that payment, though expressed in the parish books to have been made by Mr. Gosling, was in truth made by Mr. Stephens himself, after he had become the purchaser, though probably for arrears accrued in the time of Mr. Gosling. Perhaps the presumption may not be unreasonable, that a receipt when given would in its language follow the entry in the parish books, though this is far from certain. But in dealing with a modern transaction like that of a payment in 1843, we cannot rely on presumption as to what was the form of a receipt, if any was given. It was incumbent on the relators to prove the fact, if material, by direct and positive testimony according to the ordinary rules on such subjects.

I am anxious to guard against its being supposed that I have unhesitatingly acquiesced in the proposition, that a plea of purchase for valuable consideration without notice would not have been good in this case, because I believe, as I have said on former occasions, that the length to which the doctrine of constructive notice has been extended has been often productive of very considerable inconvenience, and has injuriously impeded the free transfer of real property.¹ If, on a contract for the sale of this estate, a purchaser had refused to accept the title, because the vendor could

¹ See *Ware v. Lord Egmont*, 4 De G., M. & G. 460, and n. (1), 473, 474; 2 Lead. Cas. in Eq. (3d Am. ed.) [38] *et seq.*; Sugden V. & P. (14th Eng. ed.) 755.

not explain the nature of the charge, or how it had originated, is it clear that this Court would have listened to such an objection?

* 149 * Besides all these objections which exist to the demands of the relators, assuming the construction put by them on the document of 1635 to be correct, it is further argued for the defendant, that the real meaning of that document was not that the Earl of Portland should become tenant at a rent of the six and a half acres of scattered land, but that he should purchase them in consideration of an annual rent of 6*l.* for ever, to be charged on other lands. The inclination of my opinion was at one time during the argument strongly in favour of this construction; and if this were the just interpretation of the paper, I should have had no difficulty in inferring that by some deed now lost the agreement had been carried into effect, and if necessary that the parish had by the terms of their title to the land a power to make such an arrangement. But I own that on further reflection, I incline to think that that is not the true construction of the document. I rather think that it was only meant to make the Earl of Portland a tenant, though probably it was thought that the rent, 6*l.*, was so very far beyond any possible sum which could be obtained from any other tenant, that the agreement practically gave him the enjoyment of the land for ever.

I have thought it right to make these observations on account of the importance of some of the principles involved in the case; but the ground on which I rest in thinking that the information must be dismissed is, that the relief sought can only be granted against a party who is shown to be in possession of the land, the boundaries of which have been confused, and that there is no evidence here to show that any portion of the land in question is in the possession of the defendant. The information must be dismissed with costs.

* SMITH v. ARMSTRONG.

* 150

1856. January 16. Before the Lord Chancellor Lord CRANWORTH.

The will of J. A. contained the following passage: "I forgive to my said nephew Jacob Appleford the debt of 2000*l.* which I advanced to him on loan:" the testator had, on occasion of his nephew going into partnership, advanced to him 2000*l.* for his own use, and had also at the same time lent to the partnership different sums, the nephew's proportion of which would have amounted to about 2000*l.*: *Held*, that whether the 2000*l.* was to be treated as having been a gift to the nephew or not, the testator intended in the above passage to refer to it, and not to the proportion of the partnership debt due from the nephew.

On an inquiry directed at the hearing the chief clerk certified that the advance of the 2000*l.* was a gift and not a loan: *Held*, that whatever effect this certificate might have on the hearing on further consideration, it could not be disputed by a party who had neither taken out a summons nor moved to have it varied.¹

THIS was an appeal from a decision of the Master of the Rolls, upon a point of construction arising out of the will of John Armstrong.

The testator had been previously to 1848 in partnership with George Smith as an architect, surveyor, and builder, and in the commencement of that year, being desirous of retiring from business, he entered into an arrangement with his partner for relinquishing his, the testator's, interest to his nephew, Jacob Appleford, who was to become entitled to one-third of the business. In carrying this arrangement into effect, the testator advanced to his nephew a sum of 2000*l.* for his own use; and in order to enable the partners to make up the capital with which the business was to be carried on, the testator lent to them the sum of 7000*l.* in the following manner; namely, 2100*l.* to the partners jointly, 3300*l.* to George Smith, and 1600*l.* to J. Appleford.

At the date of the testator's will, the partners' debt had been reduced by various payments to about 6000*l.*, and the testator had made other advances to his nephew, besides the 2000*l.*, to the amount of 250*l.*, which were secured by three promissory notes.

¹ See 2 Dan. Ch. Pr. (4th Am. ed.) 1312, n. (3), 1366; *Howell v. Kightley*, 8 De G., M. & G. 325.

The will, which was dated the 22d December, 1852, contained the following passage: "I forgive to my said nephew, Jacob Appleford, the debt of 2000*l.* which I advanced to him on loan, and I also forgive him, my same nephew, the principal sum of 250*l.* which I also advanced to him, and for which I hold two bills of exchange accepted by him."

The testator died on the 5th April, 1853, and in administering his estate and ascertaining what was due to it from the partners, a question arose, whether the 2000*l.* mentioned in the will was the 2000*l.* advanced to the nephew individually, or was the nephew's share of the partners' debt of 7000*l.*; and the suit was instituted to determine the point. The plaintiffs, George Smith and Jacob Appleford, asked by their bill that it might be declared, that the 2000*l.* advanced to Jacob Appleford by the testator was intended to be and was a gift from the testator to J. Appleford, and that it might be declared that the testator intended to and by his will did release J. Appleford to the extent of 2000*l.* from such part of the debt of 7000*l.* and interest due to the testator from the partnership as remained unpaid at the testator's death and as was the proper debt of J. Appleford. The defendants, the executors of the testator, contended, on the other hand, that the 2000*l.* advanced to J. Appleford was a debt, and that, whether it was so or not, it was to it that the testator referred in his will, intending to secure his nephew from being called upon to repay it.

The cause came on before the Master of the Rolls on the 6th May, 1854, when his Honor made a decree directing, among other things, an inquiry how, and in what manner, and under what circumstances, and for what purpose the sum of 2000*l.* was advanced and paid by the testator to J. Appleford, and had been retained by J. Appleford up to the present time, and an inquiry what was due from the partners to the testator's estate.

The chief clerk made his certificate, dated the 26th March, 1855. In answer to the first of the two inquiries, and on which much evidence had been adduced, he certified that the sum of 2000*l.* was agreed to be advanced and paid by the testator to Jacob Appleford as an absolute gift from the testator to Jacob Appleford out of the share of the testator in the moneys to arise from winding up the affairs of the late co-partnership between the testator and George Smith on the occasion of a new co-partnership being entered into

between George Smith and Jacob Appleford on the dissolution of the co-partnership between the testator and George Smith on the 24th June, 1848, and for the purpose of enabling Jacob Appleford to make up the sum of 4300*l.* agreed to be brought in by him as his capital in the new co-partnership, and the sum of 2000*l.* was afterwards received and retained by Jacob Appleford out of the testator's share of moneys which arose from winding up the affairs of the late co-partnership between the testator and George Smith, and had since been retained by Jacob Appleford as his own property. In answer to the second inquiry as to the amount due from the partners to the testator's estate, the chief clerk, in certifying the amount due, did not deduct the 2000*l.*, but, notwithstanding the previous finding, treated the testator as referring in his will to that sum, and not to his nephew's share of the partners' debt.

The defendants neither took out a summons, nor moved to vary this certificate; but the plaintiffs moved to vary the certificate, and that it might be declared that the 2000*l.* ought to have been deducted from the * amount found due by Jacob Apple- * 153 ford to the estate of the testator.

The motion came on, with the cause on further consideration, before the Master of the Rolls on the 13th July, 1855, when his Honor confirmed the certificate of his chief clerk, being of opinion that the testator thought that a doubt might be raised as to whether the 2000*l.* was a gift or not, and that, therefore, in order to quiet all doubts and to settle all questions, although he had in fact given the sum, he wished, in case it might be considered as a debt, that it should be released. The plaintiffs appealed from this decision to the Lord Chancellor.

Mr. R. Palmer and *Mr. G. S. Law* were for the plaintiffs.

Mr. Glasse and *Mr. De Gex*, for the defendants, supported the decision of the Master of the Rolls.

In the course of the argument, a question was raised as to how far the parties were bound by the certificate of the chief clerk, the defendants insisting that they were entitled to object to his finding that the 2000*l.* in question was a gift, and the plaintiffs submitting that as to this the certificate must be now taken as conclusive

against the defendants, who had not taken any steps to have it varied.

The Lord Chancellor, in giving judgment, said : The sole question was, what the testator meant by the passage of his will now in question, in other words, to what debt did he refer, when he said, " I forgive the debt of 2000*l.*" ? On the part of the
* 154 appellants it was * said, that there was never an advance of a sum of 2000*l.* by way of loan, for the 2000*l.* advanced in 1848 was not by way of loan, but by way of gift. On that question a reference had been directed by the Master of the Rolls to his chief clerk, and the chief clerk had found that the 2000*l.* was not a loan, but a gift. It had been questioned, whether that was a correct finding or not, and it was said by the respondents that it was incorrect, although the Master of the Rolls had come to a correct conclusion in holding that that 2000*l.* was the 2000*l.* referred to in the will.

On the first point, whether the 2000*l.* was a loan or a gift, that was concluded by the finding of the chief clerk, unless by consent, for it was never intended under the new practice to alter the rule that such a finding is conclusive unless objected to. It was not, therefore, open on the present appeal to consider the correctness of the finding, unless by consent. If the question had been open, and it was necessary to determine it, his Lordship, though doubtful on the point, was disposed to agree with the Master of the Rolls, and to think that the chief clerk was right in treating the 2000*l.* as a gift, and not as a loan.

It was not, however, material to decide the question of gift, for it was clear that the testator, when he used the words on which the present discussion arose, was referring to this sum of 2000*l.* If the chief clerk was right in saying that there was no loan, the words used would not be strictly applicable, but still there was no other 2000*l.* to which they could apply. It was impossible to suppose that the testator could be referring to a proportionate part of the three debts of 2100*l.*, 3300*l.*, and 1600*l.*; and more violence
* 155 would be offered to the words used by holding that the testator was referring * to these debts, than by supposing that he spoke of the 2000*l.* inaccurately.

His Lordship added that he came to this decision the more readily, because, although on the whole he agreed in thinking

that the advance of the 2000*l.* was a gift, yet the point appeared on the evidence to be so doubtful, that the testator might well have chosen to put it out of doubt by inserting in his will the words in question. His Lordship, therefore, considered that the Master of the Rolls was right, that there was no sufficient reason for bringing the case under review, and that the appeal must be dismissed with costs.

LEE v. GREEN.

1856. January 18, 19, 25. Before the Lord Chancellor Lord CRANWORTH.

A decree in equity for the payment by the defendant to the plaintiff of a sum of money on or before a certain day, *held*, in reference to the provisions of the Act 1 & 2 Vict. c. 110, not to confer any priority as against a deed executed by the defendant, conveying his freehold estate in a register county to trustees for the benefit of his creditors, or as against a vesting order made in the defendant's insolvency, the deed having been executed, and the vesting order having been made, previously to the registration of the decree.

Held, also, that the non-registration of the deed and of the vesting order until after the registration of the decree was immaterial, it being proved that the plaintiff had notice of the deed and of the vesting order when he registered the decree.

THIS was an appeal by the defendants against a decree made by Vice-Chancellor STUART in favour of the plaintiffs; the following were the facts of the case.

William Holmes of Norwood Green, near Halifax, in the West Riding of the county of York, farmer, who died in 1814, by his will dated the 13th March, 1813, which was duly proved by Thomas Fearnside and James Blackburne, the executors, bequeathed 250*l.*, part of a larger sum in which his son John Holmes * was indebted to him, to his executors upon trust * 156 to pay the interest thereof to his the testator's daughter Mary Shoesmith during her life, and after her death to divide the principal sum equally amongst her four children, Rachael, Hannah, William, and Jonas, whose interests were to be vested on attaining twenty-one. Mary Shoesmith died on the 12th April, 1843: all her four children attained twenty-one; Rachael became the wife, and, subsequently, the widow of ——— Lee; Hannah married

Joseph Priestley, and died in the lifetime of her mother ; William and Jonas both died in the lifetime of their mother and intestate ; Rachael Lee, under letters of administration granted to her, became the legal personal representative of her brothers William and Jonas ; and Joseph Priestley, under letters of administration granted to him, became the legal personal representative of his wife.

Shortly after the death of Mary Shoesmith, Rachael Lee, being in her own right and as administratrix entitled to three-fourths of the legacy of 250*l.*, and Joseph Priestley, as administrator being entitled to the remaining fourth, instituted a suit (*Lee v. Holmes*) against the testator's son John Holmes and Thomas Fearnside (the then sole surviving executor), for the purpose of obtaining payment of the 250*l.* and interest since the death of Mary Shoesmith ; and by a decree made in the cause, dated the 20th April, 1853, which was afterwards duly passed and entered, it was ordered, that John Holmes and Thomas Fearnside should, on or before the 20th June then next, pay to Rachael Lee 187*l.* 10*s.*, being three-fourths of the 250*l.*, together with interest at four per cent from the death of Mary Shoesmith, and that they should, on or before

the same 20th June, pay to Joseph Priestley 62*l.* 10*s.*,
 * 157 being the remaining * fourth of the 250*l.*, with like interest, and that they should also pay to Rachael Lee and Joseph Priestley their costs of the suit. On the 20th June, 1853, there was due and owing and payable under this decree a sum of 433*l.* 8*s.* 7*d.*, that is to say, 263*l.* 18*s.* 4*d.* to Rachael Lee, and 87*l.* 19*s.* 5*d.* to Joseph Priestley, together with 81*l.* 10*s.* 10*d.*, the amount of their costs as taxed.

Thomas Fearnside was, at the date of the decree and during his life, wholly without the means of satisfying what was due from him thereunder, and he died without leaving any property whatever. John Holmes was, at and before the date of the decree and thenceforth, besides other property which was of small value, absolutely entitled to the freehold farm called Field Head Farm at Norwood Green free from all incumbrances except a mortgage in fee thereof for securing 700*l.* and interest vested in Isaac Green and William Lister under an indenture of mortgage dated the 11th January, 1851.

On the 16th June, 1853, R. Lee and J. Priestley caused a proper service of the decree in *Lee v. Holmes*, and a formal demand for payment of the amount due to them thereunder, to be made on

John Holmes personally. On the same day, but, as it was alleged, after the service of the decree and demand had been made on him, John Holmes executed a deed conveying and assigning all his property, real and personal, to George Higham and Joshua Butterworth upon trust to sell, and out of the proceeds to pay off the mortgage to I. Green and W. Lister, and to apply the residue for the benefit of the creditors of John Holmes generally. Notice of this deed was given to R. Lee and J. Priestley, on the 18th June, 1853. On the 1st July, 1853, John * Holmes was * 158 arrested under a writ of attachment issued against him by the Court of Chancery at the instance of R. Lee and J. Priestley for non-compliance with the decree, and he was committed to custody in the jail at York. On the 11th July, 1853, John Holmes, being then still in custody at York jail, presented a petition to the Judge of the County Court at York for his discharge under the Act for Relief of Insolvent Debtors, whereupon, on the 12th July, 1853, the usual vesting order was made: this order was never registered. On the 8th August, 1853, the insolvent lodged his schedule of debts and credits, and by an order of the Insolvent Debtors Court, dated the 29th August, 1853, Joseph Priestley was appointed the assignee of his estate: this order was registered at Wakefield on the 7th October, 1853. A proper memorandum or minute of and relating to the decree in *Lee v. Holmes* was, on the 10th August, 1853, left by or on behalf of R. Lee and J. Priestley with the senior Master of the Court of Common Pleas at Westminster for registration, and was duly registered accordingly; and on the 26th August, 1853, the decree or a memorial thereof was duly registered at the proper registry office at Wakefield.

Under the circumstances just stated, R. Lee and J. Priestley insisted that they were in no way bound or affected by the deed of the 16th June, 1853, but were entitled as judgment creditors of John Holmes to a charge upon his freehold farm and premises for the whole amount due and payable to them for principal, interest, and costs under the decree in priority to all other claims thereon, except the mortgage of I. Green and W. Lister, which was the only incumbrance on the same premises then standing registered against John Holmes at the registry office at Wakefield.

* I. Green and W. Lister, under a power of sale con- * 159 tained in their mortgage, subsequently sold the estate in

question by private contract ; and it was alleged by R. Lee and J. Priestley that, in the course of carrying this sale into effect, I. Green and W. Lister expressly undertook to pay over to them the surplus of the purchase-money after the satisfaction of the mortgage ; but I. Green and W. Lister, being served with notice of the claims of the trustees under the deed of the 16th June, 1853, retained the whole of the purchase-money, 1380*l*. The mode, however, in which it will be seen that the Lord Chancellor disposed of this part of the case renders it unnecessary to go more particularly into the matter.

The bill in the present suit was filed on the 11th January, 1855, by R. Lee and J. Priestley, against I. Green and W. Lister as mortgagees, and against George Higham and Joshua Butterworth as trustees of the deed of the 16th June, 1853 ; and it prayed a declaration that the plaintiffs, as judgment creditors of John Holmes under and by virtue of the decree made in the suit of *Lee v. Holmes*, became entitled to a charge upon his freehold farm and premises, subject only to the mortgage security of the defendants I. Green and W. Lister, and in priority to all other claims thereon, and also became entitled to have the balance of the purchase-money for the farm and premises, remaining after satisfying the amount justly due to the last-named defendants on their mortgage security, applied in payment of what was due and payable to the plaintiffs for their principal moneys, interest, and costs under the decree, and it prayed accounts and directions consequent on this declaration. The bill alleged, among other things, that the deed of the 16th June, 1853, had never been registered in the county of York or elsewhere, that it was the result of a
 * 160 scheme * formed by J. Holmes and his trustees for the express purpose of depriving the plaintiffs of the benefit of the decree, or at least of impeding them in prosecuting the same against the property of J. Holmes, and that the defendant G. Higham acted as the solicitor of J. Holmes, in the suit of *Lee v. Holmes*, and in other matters, and that in that character he prepared the deed and advised J. Holmes as to his execution thereof, and that the defendant J. Butterworth was the nephew of G. Higham, and at his request consented to become a trustee under the deed.

The cause came on to be heard before Vice-Chancellor STUART on the 9th July, 1855, when his Honor made a decree, declaring

that the plaintiffs, as judgment creditors of John Holmes under and by virtue of the decree in *Lee v. Holmes*, became entitled to a charge upon his freehold farm and premises, subject only to the mortgage security of the defendants I. Green and W. Lister, and in priority to all other claims thereon, and also became entitled to have the balance of the purchase-money for the farm and premises, remaining after satisfying the amount justly due to the said defendants on their mortgage security, applied in payment of what was due and payable to the plaintiffs for their principal moneys, interest, and costs, under the decree, and directing the following accounts to be taken: namely, first, an account of what at the time of their receipt of the purchase-money for the farm and premises was due to the defendants I. Green and W. Lister, for principal, interest, and costs, charges, and expenses, including any costs, charges, and expenses properly incurred, subsequent to the receipt of the purchase-money; secondly, an account of the interest received by the defendants I. Green and W. Lister, or either of them, of the purchase-money from the purchaser of the farm and premises; * thirdly, an account of the rents and profits * 161 of the farm and premises received by the said defendants, since they entered into possession, or which, without their wilful neglect or default, might have been received, and directing that what should be found due to the said defendants for principal and interest, and costs, charges, and expenses as aforesaid, should be deducted from the amount of the purchase-money, and of the interest thereon, if any, received by the defendants I. Green and W. Lister, together with what should appear to be due from them on the account of receipts and profits, and that the balance should be ascertained, and the interest computed on such balance from the time when the purchase-money was paid at the rate of four per cent, and that the defendants I. Green and W. Lister, should pay the amount of such balance and interest together with subsequent interest on such balance, to the time of payment to the plaintiffs towards satisfaction of the several sums which on the 20th of June, 1853, were due and payable to them for their respective principal moneys, and interest, and costs, under the decree, together with interest on the same several sums from the last-mentioned day at the rate of four per cent, and that the defendants I. Green, W. Lister, George Higham, and Joshua Butterworth, should pay to the plaintiffs their costs of the suit.

Against this decree two separate appeals were presented by the defendants, one by G. Higham and J. Butterworth, the trustees of the deed of the 16th June, 1853, and the other by I. Green and W. Lister, as mortgagees. (a)

(a) The 13th, 18th, and 19th sections of the Act 1 & 2 Vict. c. 110, on the effect of which the argument mainly turned, are as follow:—

XIII. “And be it enacted, that a judgment already entered up or to be hereafter entered up against any person in any of her Majesty’s superior Courts at Westminster shall operate as a charge upon all lands, tenements, rectories, advowsons, tithes, rents, and hereditaments (including lands and hereditaments of copyhold or customary tenure), of or to which such person shall, at the time of entering up such judgment, or at any time afterwards, be seised, possessed, or entitled for any estate or interest whatever, at law or in equity, whether in possession, reversion, remainder, or expectancy, or over which such person shall, at the time of entering up such judgment, or at any time afterwards, have any disposing power which he might, without the assent of any other person, exercise for his own benefit, and shall be binding as against the person against whom judgment shall be so entered up, and against all persons claiming under him after such judgment, and shall also be binding as against the issue of his body and all other persons whom he might, without the assent of any other person, cut off and debar from any remainder, reversion, or other interest in or out of any of the said lands, tenements, rectories, advowsons, tithes, rents, and hereditaments, and that every judgment creditor shall have such and the same remedies in a Court of Equity against the hereditaments so charged by virtue of this Act, or any part thereof, as he would be entitled to in case the person against whom such judgment shall have been so entered up had power to charge the same hereditaments, and had by writing under his hand agreed to charge the same, with the amount of such judgment debt and interest thereon: provided that no judgment creditor shall be entitled to proceed in equity to obtain the benefit of such charge until after the expiration of one year from the time of entering up such judgment, or in cases of judgment already entered up, or to be entered up before the time appointed for the commencement of this Act, until after the expiration of one year from the time appointed for the commencement of this Act, nor shall such charge operate to give the judgment creditor any preference in case of the bankruptcy of the person against whom judgment shall have been entered up, unless such judgment shall have been entered up one year at least before the bankruptcy: provided also, that as regards purchasers, mortgagees, or creditors, who shall have become such before the time appointed for the commencement of this Act, such judgment shall not affect lands, tenements, or hereditaments, otherwise than as the same would have been affected by such judgment if this Act had not passed: provided also, that nothing herein contained shall be deemed or taken to alter or affect any doctrine of Courts of Equity whereby protection is given to purchasers for valuable consideration without notice.”

XVIII. “And be it enacted, that all decrees and orders of Courts of Equity, and all rules of Courts of Common Law, and all orders of the Lord Chancellor

* *Mr. Wigram* and *Mr. Toller*, for the plaintiffs. — They * 162
 submitted that the decree of the Vice-Chancellor * was cor- * 163
 rect. The plaintiffs showed a better title to the equity of
 redemption of the property in question * than those who * 164
 claimed either under the deed or under the insolvency.
 The decree made in *Lee v. Holmes* on the 20th April, 1853, con-
 ferred on the plaintiffs a complete title at law, which must prevail
 unless it could be in any way displaced. *Sharpe v. The Earl of*
Scarborough. (a) The argument on the other side was, that by
 the nineteenth section of the Act 1 & 2 Vict. c. 110, no benefit
 could be obtained by the plaintiffs from the decree until the 10th
 August, 1853, when the memorandum for registration was left at
 the Common Pleas. The answer to this was, that the section

or of the Court of Review in matters of bankruptcy, and all orders of the Lord Chancellor in matters of lunacy, whereby any sum of money, or any costs, charges, or expenses, shall be payable to any person, shall have the effect of judgments in the superior Courts of Common Law, and the persons to whom any such moneys, or costs, charges, or expenses, shall be payable, shall be deemed judgment creditors within the meaning of this Act; and all powers hereby given to the Judges of the superior Courts of Common Law with respect to matters depending in the same Courts shall and may be exercised by Courts of Equity with respect to matters therein depending, and by the Lord Chancellor and the Court of Review in matters of bankruptcy, and by the Lord Chancellor in matters of lunacy; and all remedies hereby given to judgment creditors are in like manner given to persons to whom any moneys or costs, charges or expenses, are by such orders or rules respectively directed to be paid."

XIX. " Provided always, and be it further enacted, that no judgment of any of the said superior Courts, nor any decree or order in any Court of Equity, nor any rule of a Court of Common Law, nor any order in bankruptcy or lunacy, shall by virtue of this Act affect any lands, tenements, or hereditaments, as to purchasers, mortgagees, or creditors, unless and until a memorandum or minute, containing the name and the usual or last known place of abode, and the title, trade, or profession of the person whose estate is intended to be affected thereby, and the Court, and the title of the cause or matter in which such judgment, decree, order, or rule shall have been obtained or made, and the date of such judgment, decree, order, or rule, and the account of the debt, damages, costs, or moneys thereby recovered or ordered to be paid, shall be left with the senior Master of the Court of Common Pleas at Westminster, who shall forthwith enter the same particulars in a book in alphabetical order by the name of the person whose estate is intended to be affected by such judgment, decree, order, or rule, and such officer shall be entitled for any such entry to the sum of five shillings; and all persons shall be at liberty to search the same book on payment of the sum of one shilling."

(a) 4 Ves. 538.

referred to related only to the remedies created by the particular Act, and was merely a qualification of the thirteenth section, which enacted that a judgment when entered up should operate as a charge on real estate; but the title of the plaintiffs was quite independent of the Act. J. Holmes had, therefore, no interest of which he could lawfully dispose, and under these circumstances the assignment in insolvency operated as an innocent assurance. *Mitford v. Mitford.* (a) Again, the order in insolvency was not registered until October, 1853, and under the Act it could have no effect until so registered (see 1 & 2 Vict. c. 110, § 46), unless, indeed, it was shown that the plaintiffs had notice of it when they registered their decree; no such notice was, however, proved.

They referred to the general provisions of the Yorkshire Registry Act (2 & 3 Anne, c. 4), and to the Acts 2 Vict. c. 11, § 5, and 18 and 19 Vict. c. 15, § 4: they also mentioned *Robinson v. Hedger* (b) and *Cathrow v. Eade.* (c)

* 165 * *Mr. Malins* and *Mr. J. T. Humphry*, for the appellants G. Higham and J. Butterworth. — Independently of the Statute 1 & 2 Vict. c. 110, the decree in *Lee v. Holmes* gave the plaintiffs no charge on any part of the real estate of J. Holmes, and therefore they had no lien when the deed of the 16th June, 1853, was executed. The case of *Sharpe v. The Earl of Scarborough*, (d) cited on the other side, did not establish any thing contrary to this. The plaintiffs' title depended entirely on the Act 1 & 2 Vict. c. 110, but that Act gave no right until registration. Thus J. Holmes was at liberty down to the 10th August, 1853, to dispose of the equity of redemption in question, just as if no decree existed against him; and before that day it had passed from him, either by virtue of the deed of the 16th June, 1853, or the order in insolvency. As to the deed, the Vice-Chancellor seemed to have taken an unfavourable view of the conduct of J. Holmes and his solicitor in regard to it; but it was submitted that the transaction was quite justifiable under the circumstances. *Pickstock v. Lister.* (e) It was said that the order in insolvency ought to have been registered; this no doubt was so, but the objection became immaterial here, where one

(a) 9 Ves. 87.

(d) 4 Ves. 588.

(b) 14 Jur. 784.

(e) 3 M. & S. 371.

(c) 1 Sm. & G. 423.

of the persons taking the objection was the party who ought to have registered the order. The plaintiffs, therefore, could not have the benefit of the decree under which they claimed, first, because they were not purchasers for valuable consideration, but only general creditors, and, secondly, because they must be taken to have had express notice of the vesting order: their only right was to go in under the insolvency.

They referred to the thirteenth, eighteenth, nineteenth, * forty-sixth, and fifty-ninth sections of the Act 1 & 2 Vict. * 166 c. 110; to the Acts 2 & 3 Vict. c. 11, and 3 & 4 Vict. c. 82, and to Sugden's Vend. & Purch. Vol. II. p. 402, ed. 10: they cited *Johnson v. Holdsworth*, (a) *Whitworth v. Gaugain*, (b) *Brearclyff v. Dorrington*, (c) and *Ex parte Boyle*. (d)

Mr. G. L. Russell, who was with *Mr. Elmsley*, for the other appellants, I. Green and W. Lister. — He submitted that the decree of the Vice-Chancellor was wrong, because his Honor had not only not given the mortgagees their costs, but had ordered them to pay costs, and also to pay interest: he insisted that the mortgagees had acted with perfect good faith in the transaction.

Mr. Wigram replied. — He submitted that the undertaking given by I. Green and W. Lister in reference to the proceeds of the sale of the property in question was alone sufficient to sustain the Vice-Chancellor's decree. He cited *O'Connor v. Spaight*, (e) *The Taff Vale Railway Company v. Nixon*, (g) *Foley v. Hill*. (h)

January 25.

The Lord Chancellor delivered judgment. Having stated the facts of the case as above set out, that the bill in the present suit had been filed on the assumption that by the registration of the decree in *Lee v. Holmes* the plaintiffs had become entitled as judgment creditors to the surplus of the proceeds of the sale of the premises in question after satisfying the mortgage, that the Vice-Chancellor had made a decree * in favour of the claim, * 167

(a) 1 Sm. N. S. 106.

(b) 3 Hare, 416; 1 Phil. 728.

(c) 4 De G. & S. 122.

(d) 3 De G., M. & G. 515.

(e) 1 Sch. & Lef. 305.

(g) 1 H. L. Cas. 111.

(h) 2 H. L. Cas. 28.

and that the question on the present appeal was whether that was a correct view of the law or not, his Lordship proceeded as follows: The decision of this question depends mainly on the Statute 1 & 2 Vict. c. 110. By the thirteenth section it is enacted that, &c. [his Lordship here read the section]; and by the eighteenth, that, &c. [his Lordship here read the section]; and then the nineteenth section provides that, &c. [his Lordship here read the section]. Two years after the passing of this Act, another statute (3 & 4 Vict. c. 82) was passed, which (section 2) reciting the provisions of the former Act (1 & 2 Vict. c. 110), and that doubts had been entertained whether a purchaser, mortgagee, or creditor, having notice of any such judgment, decree, order, or rule, would not in equity be affected thereby, notwithstanding such a memorandum or minute of the same as in the former Act mentioned might not have been left with the senior Master of the said Court of Common Pleas, declares and enacts, "that no such judgment, decree, order, or rule as aforesaid shall, by virtue of the said Act, affect any lands, tenements, or hereditaments at law or in equity, as to purchasers, mortgagees, or creditors, unless and until such a memorandum or minute as in the said Act in that behalf mentioned shall have been left with the senior Master of the said Court of Common Pleas at Westminster, any notice of any such judgment, decree, order, or rule to any such purchaser, mortgagee, or creditor in any wise notwithstanding." In the last session of Parliament another Act was passed (18 & 19 Vict. c. 15), the object of which (section 5) was to remove a doubt which had arisen on the former Act as to the extent of the operation of the provisions of the second section for the protection of purchasers against judgments.

* 168 * The first point in the present case about which I am satisfied is, that the decree in question could not affect the lands except by virtue of the Act 1 & 2 Vict. c. 110. Before that Act, a decree only operated against the person of a defendant: a judgment at law indeed constituted a lien in favour of the creditor, but that was not the case with a decree in equity. The clear meaning, however, of the Act is, that, as regards mortgagees, creditors, and purchasers, a decree gives no right unless and until it is registered. In the present case, therefore, the decree gave no right upon the lands until the 10th August, when it was registered; and the question is, what was the right which it then gave?

It appears to me clear that on the 16th June, 1853, there was a valid conveyance executed, against which the decree, being then unregistered, would be perfectly innocuous : it was a conveyance to a purchaser or creditor, it does not matter which, and, therefore, falls within the provision of the nineteenth section of the Act, " as to purchasers, mortgagees, or creditors." It was said that it was a fraudulent contrivance, but, in my opinion, it was not so, and with all deference, I think it may be a very honest proceeding on the part of a debtor, to prevent any one creditor from taking the whole of his assets, and this was the effect of the transaction in question.

It was then suggested, that the deed of the 16th June, 1853, was inoperative by reason of the vesting order of the 12th July, and that that order took the estate from the trustees. That may be so, but it does not lie in the mouth of the plaintiffs to say it, for they cannot contend that the estate was not validly vested as against themselves, but that it was so as against the trustees of the deed. If, as between the general creditors and the * creditors claiming under the deed, the estate is to be * 169 taken away from the trustees, it can only be for the purpose of administration in the Insolvent Court. Then, as to registration and notice, it is quite clear that want of registration cannot be set up by any person who has notice ; and in this case the plaintiffs must be taken to have had notice of the deed, and also of the order, at the time when they registered the decree.

It thus appears that the plaintiffs have wholly failed to establish that under their decree they are entitled to any rights as against the defendants. It was, however, endeavoured to set up an engagement on the part of the defendants Green and Lister, the mortgagees, whereby they undertook to pay over to the plaintiffs the surplus of the proceeds of the sale after satisfying the mortgage ; but this is not a matter which can entitle the plaintiffs to relief in this suit. It may be a special matter of claim against Green and Lister personally, if they misapplied the fund, but is not a matter with which the other defendants, the trustees, have any concern. It is quite clear, too, that it is not a ground on which relief is sought by the bill, for, though it is asserted that the plaintiffs have been misled by the alleged undertaking, it is evident that it did not mislead them as to any rights which they are now seeking to establish.

I think, therefore, that the bill ought to have been dismissed and with costs. I had at one time some doubts, whether the defendants, Green and Lister, ought to have their costs; but, not seeing that their undertaking has in any way misled the plaintiffs, I think that there ought to be no distinction, and that the bill must be dismissed as against them also with costs, without prejudice, however, to any proceedings which the plaintiffs may be advised to take against them on their undertaking. There will be no costs of the appeal.

* 170 * Between JOHN TREVOR, Esq., deceased, Plaintiff,

AND

MATTHEW BLUCKE, Esq., deceased, and Others, Defendants;

AND

Between WILLIAM STARISMORE, Plaintiff,

AND

RICHARD CHISWELL and Others, Defendants.

1854. July 29. 1855. April 21, 25. November 12. Before the Lord Chancellor Lord CRANWORTH and the LORDS JUSTICES.

On the death of an usher of the Court in 1702, a large sum, for which as usher he was accountable, was due from him: in a suit instituted for the administration of his estate, more than sufficient was realized to liquidate the amount, and all sums actually claimed were paid: in 1719 the Court ordered a fund sufficient to answer the unclaimed sums to be invested, and directed the interest to be paid to the representative of the deceased usher until further order; similar orders for payment of the interest were from time to time down to 1833 made on the application of the existing representative of the usher; and in 1854 a petition was presented for the same purpose by the then representative. On a full discussion of the case, and on the petition being amended, an order was made for the transfer to him of the principal fund.

Whether there can be an appeal to the House of Lords upon a matter relating to the suitors' fund, *quære*, by the Lord Chancellor.

THIS was a petition by the Rev. William Strong Blucke, the personal representative of the defendant Matthew Blucke, praying for the transfer to him of a sum of 5299*l.* 8*s.* 1*d.* reduced annuities, standing to the credit of the cause of *Trevor v. Blucke*. The

following were the facts as stated in the petition on which the application was founded.

On the 28th February, 1669, Matthew Blucke, Esq., the paternal ancestor of the petitioner, was admitted into the office of usher of the Court ; and by articles then dated, covenanted for himself, his heirs, executors, and administrators, with Sir HARBOTTLE GRIMSTONE, the then Master of the Rolls, to pay according to the order of the Court the money remaining due from the office of usher * in the times of Scott, Mann, and Herne, the three * 171 preceding ushers, and also the money which should be paid into the office in his time ; and he gave several real and other securities for the performance of his covenant. Matthew Blucke continued in the office till October, 1702, when he died intestate, and was succeeded by the plaintiff John Trevor, who in Michaelmas term, 1707, exhibited his bill against the defendant Matthew Blucke (the son and heir and only child of Matthew Blucke the usher and then an infant) and others, in order to have the real and personal assets of Matthew Blucke the usher and the securities given by him applied to pay the debts due from the office at his death. Upon the hearing of the cause on the 17th July, 1708, it was referred to Mr. ROGERS, then one of the Masters of the Court to take an account of the office debts, and of the real and personal assets of Matthew Blucke the usher, and it was decreed that the estates comprised in the securities should be sold, and the money arising thereby and what should appear to be due on the account of the personal assets be brought before the then two senior Masters of the Court to be a fund for the payment of the office debts, and so much thereof as was necessary to answer the then present demand was to be reserved for that purpose, and the rest placed out at interest to improve the fund, and several directions were given touching the costs, and touching an estate in Essex descended to the defendant Matthew Blucke the infant. This estate, after Matthew Blucke the infant had attained the age of twenty-one years, was sold by order of the Court, and the moneys arising by that sale, and by the sale of the real and other estates comprised in the securities, and from the personal assets, were brought before the then two senior Masters of the Court, as was also the money due to Matthew Blucke the usher recovered in the second * cause (wherein William Starismore, the administrator *de* * 172 *bonis non* of Matthew Blucke the usher, was the plaintiff,

and which cause was commenced in pursuance of the decree in the first cause, for getting in the debts). This money, with the improvements thereof, in December, 1719, exceeded the debts due from the office, and which had been from time to time stated by several reports made by Master ROGERS. By an order of the Court, made on the 21st December, 1719, it was ordered, that so much of the money as would answer the debts stated by the Master's report therein mentioned, and not since satisfied, should be placed out on government securities with the Master's approbation, and that after payment of Mr. Trevor's costs and the fees therein mentioned to be due to him as usher, the surplus of the money in the Master's hands should be paid to the defendant Matthew Blucke, and also the interest and produce of the money so to be placed out as aforesaid, subject to the further order of the Court. Pursuant to this order, Mr. Trevor's fees and costs were paid, and money sufficient to answer the office debts was placed out at interest on government securities and replaced from time to time as the securities were paid off (the same for some time stood vested in 4623*l.* 14*s.* 8*d.* Old South Sea annuities placed to the credit of the accountant-general in the cause of *Trevor v. Blucke*, but recently by reason of an arrangement made by the government was paid off and reinvested by the accountant-general in the purchase of 5299*l.* 8*s.* 1*d.* reduced bank annuities in the name of the accountant-general), and the surplus of the moneys in the hands of the two senior Masters was soon after making the last order paid to the defendant Matthew Blucke, and the interest on the former securities and also the interest or dividends on

* 173 the South Sea annuities were from time to time paid to * the defendant Matthew Blucke as the same became due at or before Lady Day, 1747, soon after which the defendant Matthew Blucke died intestate, and thereupon letters of administration of his personal estate were granted to Elizabeth Blucke, his widow. By an order of the Court, dated the 18th March, 1748, it was ordered that 92*l.* 7*s.* 8*d.* cash in the bank should be paid to Elizabeth Blucke, and that the growing dividends of the Old South Sea annuities should from time to time be also paid to her as the administratrix of the defendant Matthew Blucke, pursuant to the former order and subject to the further order of the Court. Pursuant to this order the 92*l.* 7*s.* 8*d.* was paid to Elizabeth Blucke, and the interest of the Old South Sea annuities was from time to time paid

to her as the same became due at or before Michaelmas Day, 1762, soon after which Elizabeth Blucke died, having made her will and appointed Catherine Blucke, her eldest daughter, sole executrix thereof, who proved the same. Letters of administration *de bonis non* of Matthew Blucke deceased were also granted to Catherine Blucke, who thereupon obtained an order, dated the 2d April, 1763, whereby it was ordered that the interest accrued on the Old South Sea annuities since Michaelmas, 1762, and also the future dividends thereof, should be paid to her; and the same were paid accordingly down to Lady Day, 1773, soon after which Catherine Blucke died, having made her will and appointed Elizabeth Webster, her sister, sole executrix thereof, who proved the same. Letters of administration *de bonis non* of Matthew Blucke deceased were also granted to Elizabeth Webster, who thereupon on the 4th December, 1773, preferred her petition to the then Lord Chancellor, stating the several matters aforesaid, and praying that the interest accrued due on the Old South Sea annuities from Lady Day then last and the growing dividends * thereof * 174 for the future might be paid to her subject to the further order of the Court; and by an order made on this petition on the 21st December, 1773, the same was ordered accordingly. Pursuant to this order the dividends on the Old South Sea annuities were from Lady Day, 1773, from time to time paid to Elizabeth Webster as the same became due at or before Michaelmas, 1796, soon after which, on the 26th February, 1797, she died intestate. Letters of administration of the personal estate and effects of Elizabeth Webster were granted to Richard Webster, clerk, her only son and next of kin, and letters of administration *de bonis non* of Matthew Blucke were also granted to him. On the 27th April, 1797, Richard Webster preferred his petition to the then Lord Chancellor, stating the several matters aforesaid, and praying that the interest accrued due on the Old South Sea annuities from and since Michaelmas then last, and the growing dividends thereof for the future, might be paid to him as the administrator *de bonis non* and legal personal representative of Matthew Blucke, subject to the further order of the Court; and by an order made on the petition, dated the 15th June, 1797, the same was ordered accordingly. Pursuant to this order, the dividends on the Old South Sea annuities were from Michaelmas, 1796, from time to time paid to Richard Webster as the same became due at or before Lady Day,

1831, soon after which, on the 6th July, 1831, Richard Webster died, having first duly made his will, dated the 14th July, 1830, and appointed Robert Stewart Blucke, the father of the present petitioner, sole executor thereof, who duly proved the same. Letters of administration of the personal estate and effects not theretofore administered of Matthew Blucke, the paternal ancestor of the present petitioner, were also granted to Robert S. Blucke, whereby he became the legal representative as well of

* 175 Richard Webster deceased, as of Matthew * Blucke deceased. On the 14th July, 1832, Robert S. Blucke preferred his petition to the then Lord Chancellor, stating the several matters aforesaid, and praying that the sum of 188*l.* 14*s.* 2*d.* cash, being dividends accrued due on the Old South Sea annuities since Lady Day, 1831, might be paid to him, and that the growing dividends thereof for the future might be paid to him subject to the further order of the Court. By an order made on this petition, dated the 3d April, 1833, it was ordered that the sum of 208*l.* 1*s.* 3*d.* cash in the bank remaining on the credit of the cause of *Trevor v. Blucke* should be paid to R. S. Blucke, and that the interest to accrue on the Old South Sea annuities should be paid to R. S. Blucke during his life or until the further order of the Court. Pursuant to the last order the 208*l.* 1*s.* 3*d.* cash was paid to R. S. Blucke, and the dividends on the Old South Sea annuities were from thenceforth from time to time paid to him until his death. R. S. Blucke died on the 31st December, 1853, having first duly made his will, dated the 2d March, 1846, and thereby appointed William Strong Blucke, the present petitioner, and another person, executors thereof, but the will was proved by the petitioner alone, according to a suggestion of the testator contained in his will; and letters of administration of the personal estate and effects not theretofore administered of M. Blucke deceased were also granted to the petitioner, whereby he became the legal personal representative as well of R. S. Blucke deceased as of M. Blucke deceased.

Under these circumstances W. S. Blucke, on the 20th May, 1854, presented a petition to the Master of the Rolls, setting forth the facts and circumstances hereinbefore stated, and stating further that there was then in the hands of the accountant-general

* 176 the sum * of 67*l.* 6*s.* 8*d.* cash, being the dividend accrued due on the said sum of 4623*l.* 14*s.* 8*d.* Old South Sea annu-

ities since the death of the said R. S. Blucke, and praying that the said sum of 67*l.* 6*s.* 8*d.* cash might be paid to the petitioner, and that the growing dividends on the 5299*l.* 8*s.* 1*d.* reduced annuities, formerly 4623*l.* 14*s.* 8*d.* Old South Sea annuities, might for the future be paid to the petitioner, subject to the further order of the Court.

The petition came on to be heard on the 1st July, 1854, when his Honor declined to make any order in respect of the prayer of the petition, but directed that the costs of the solicitor to the suitors' fund, who was served with and appeared upon the petition, should be paid out of the dividend upon the said sum of 5299*l.* 8*s.* 1*d.* reduced annuities. (a)

The matter was thereupon brought by way of appeal before the Lord Chancellor. The petition was opened on the 29th July, 1854, when his Lordship directed it to stand over, in order that it might be amended by praying for a transfer of the capital, and that search might be made for the proceedings, papers, and documents in the suits.

The petition was amended accordingly: it set forth the several facts above mentioned, and further stated that from the length of time which had elapsed since any claim had been made against the fund, except by the representatives of Matthew Blucke, it might reasonably be presumed that any claim which might have been made against the same by any person, except as aforesaid, had been satisfied, or that no person except *such repre- * 177
sentatives was or could be entitled to make any such claim: it prayed that notwithstanding the order made by the Master of the Rolls, the sum of 5299*l.* 8*s.* 1*d.* reduced annuities, into which the sum of 4623*l.* 14*s.* 8*d.* Old South Sea annuities had been converted, together with the dividends which had accrued due in respect of either sum of stock since the death of R. S. Blucke, except only so much of such dividends as had been paid or applied in payment of the costs of the solicitor to the suitors' fund pursuant to the last-mentioned order, might be transferred and paid by the accountant-general to the petitioner, or that the dividends which had accrued on the said sums of stock except as aforesaid, and the future dividends to accrue due on the 5299*l.* 8*s.* 1*d.* reduced annuities, might be paid to the petitioner and the personal representatives for the time being of Matthew Blucke.

(a) See 19 Beav. 373.

The search directed by the Lord Chancellor produced no result material to be noticed ; and the case came on again to be heard before his Lordship on the 21st and 25th April, 1855.

Mr. Fooks supported the petition.

Mr. J. H. Taylor, for the suitors' fund, was heard in opposition. (a)

* 178 * *Mr. Fooks* replied.

1855. November 12.

The Lord Chancellor subsequently directed the case to be again argued before the full Court of appeal. This second argument took place accordingly, when the following judgments were delivered by their Lordships.

THE LORD CHANCELLOR. — This question arises upon a petition in a suit, a decree in which was made in the year 1708. The suit was instituted by Mr. Trevor, who had then been recently appointed usher of the Court, an officer who appears to have stood to the Rolls in some respects in the same situation, at least as to the receipt of money, in which the Master stood with regard to the Chancellor's Court: it was instituted against the representatives of Blucke, who had been usher since the year 1669. Various accounts were from time to time directed, and from the first account it appears that there was due in respect of receipts by the ushers preceding Blucke, but for which receipts he had by his covenant made himself responsible, a sum of 1095*l.*, and with respect to receipts by him, either personally by himself or by a man of the name of Grimes who acted as his agent, a further sum of about 18,000*l.* making in the whole a sum of above 19,000*l.* Steps were then taken for realizing the assets of Blucke, and from time to

(a) One point urged by the learned counsel in opposition to the petition may be noticed. He contended that if Blucke the usher had not been a defaulter, Trevor would at once have received the amount from his, Blucke's representatives, and Trevor or his representatives would have handed it over to the accountant-general, when that officer was instituted in 1725; that if this had happened, Blucke's representatives could have had no interest whatever in the fund, and thus it appeared that they now claimed to be in a better position by Blucke having been a defaulter than if he had faithfully performed his duty.

time between the date of the decree and 1719, various sums were got in. Of the demands which were made in respect of sums paid into Court in the time of Blucke himself, the greater part were paid ; so that the whole demand upon Blucke's estate was reduced to about 6000*l*. This sum was made up of the 1095*l*., which had accrued previously to 1669 in the time of Blucke's predecessors, and the remainder was what had accrued * in * 179 Blucke's own time, being generally in respect of very small sums, a few only amounting to three figures, 50*l*., 30*l*., and sums of that sort.

The accounts of Blucke's estate were then taken, and it appeared that there was more than enough to liquidate all possible demands. The estate was made to pay the costs ; and, inasmuch as it was not certain that there might not still be demands made in respect of the old claims that had arisen in the time of Blucke's predecessors, and of such of those claims which had arisen in his own time as had not yet been claimed, the Court directed a fund to be invested to meet those demands if they ever should be set up, that the surplus should be paid over to Blucke's estate, and that the dividends of the sum so set apart should be paid to Blucke the son until further order ; that is to say, that the whole surplus that was realized in the cause should be paid over to Blucke the son, except the sum which had been retained in Court to answer any possible demand, he, however, receiving the dividends in the mean time. Blucke the son lived until the year 1748, when a further order was made for the payment of the dividends to his widow. They were enjoyed by her until her death at a great age, when a new representation was taken out, but still in the same family. So it has gone on ; representation has been taken out from time to time, and the interest of the fund has been enjoyed from 1719 down to the present time by Blucke the son of the usher, and those claiming under him. On the death of the last representative by whom the interest had been received, a fresh representation was taken out, and an application made for a similar order in favour of the new representative to that which had always been previously made. The matter was brought before the Master of the Rolls, who took this view of it, * that the fund was in the nature of a * 180 trust fund, and that the persons really entitled to the money were not Blucke the usher in his time or his representatives since, but the suitors in the different causes in which the sums had been

paid in, and no length of time justifying a breach of trust, although the dividends had been wrongly paid for nearly a century and a half, he could not sanction the proceeding and continue the order.

The petition was then brought before me upon appeal more than a year ago, and I then said that I would not make such an order as had been made by my predecessors, but that either I would decide in conformity with the view of the Master of the Rolls that the petitioner had no title, and that the fund must remain in Court for the benefit of those who were the *cestuis que trust* (or whatever name may be given to them) in the different causes, or that I would make an order to transfer the principal. It seemed to me to be mere trifling to pretend that there was any real necessity for security in the year 1855 against claims that were stale claims in the year 1669. The petition consequently was amended, and in that state I heard it before the long vacation in the present year, and I confess that I came to a very clear opinion that the petitioner's claim was well founded, and that he was entitled to the fund. I proceeded upon the short and simple ground that in the year 1719 there had been what amounted to a declaration of right by this Court, for, although in terms there was no declaration of right, the setting apart of the fund could proceed upon nothing but a presumed preceding declaration of right; and I thought that what had been done in 1719, and acted upon ever since, was quite sufficient to warrant me in making the order asked. As, however, it

was a case in which I had the misfortune to differ in my
 * 181 view from the * learned Judge below, and as it was a case in which from the nature of things it would scarcely be possible that there should be an appeal to the House of Lords (indeed I do not know that there could be an appeal to the House of Lords upon a matter of the suitors' fund), I was exceedingly anxious to fortify the view I took of it by the assistance of the Lords Justices, and therefore got them to be so good as to hear it with me. I believe they now concur in the view which I have stated; namely, that there was a declaration of right in 1719, subject to a possible claim, not a probable one, in respect of demands which have now become practically impossible, that that declaration of right has been acted upon ever since, and that, therefore, the petitioner's claim is well founded.

This reason, I think, would be quite sufficient, and if I could not

see my way to the ground on which the Court acted in 1719, still I should be inclined to say that I must follow what was then done rightly or wrongly, and that directions being then given which assume a declaration of right, I must act upon them. I ought, however, to add that, attending as I have accurately to all these old documents, I think I do see my way to a very reasonable conclusion as to what the ground was upon which the Court then proceeded, although I repeat that it is not necessary for the judgment I now give that I should be right upon that point. We are so much in the habit, as to moneys paid into Court, of considering the Court as a trustee for the parties beneficially interested, that we lose sight a little of the mode in which these matters were dealt with in bygone times. I believe that in the times to which we are now referring, when money was paid in, the parties to whom it was paid were treated as mere debtors to that amount; that is, debtors to the amount if it was ever demanded. The * documents in this case illustrate this very forcibly, for * 182 each succeeding usher was compelled to bind himself by covenant and to give security; he was made responsible not merely for the moneys which he received, but for the debts, as they were called, of his predecessor in respect of what he had received. That being done, the Court thought itself secure, and did not care what the usher did with the money; the Court merely treated him as a debtor. If that was the view of the Court, and the mode in which it treated the ushers in respect to the receipt of money, that explains the whole of this case, because then the order was quite right. Blucke's representatives were debtors for the sums of money that had been received by him and his predecessors, but only debtors: provision was therefore properly made for the payment of such debts if they were ever demanded, and the fund was properly set apart for the representatives' benefit, subject to those claims. Five or six years afterwards, there was, as we know, great confusion in the Court arising from the defalcations of the Master, and a new and better system was then adopted. What has been said is very true, that if the parties in this case had lived twenty-five years later than they did, the result as to this fund would probably have been quite different: that, however, does not bear on the present question. In 1719 the Court had to adjudicate according to what it considered the rights of the parties at the time, and the mode adopted was by setting apart a fund to meet

any very improbable but possible claims, and subject to the possibility of those claims giving the interest to Blucke's representative. Those claims have now become practically impossible. I would just throw out a hint, that we might guard the direction with the qualification or condition that the party receiving the fund should be responsible for any of the old demands mentioned in the
 * 183 schedule if any should * be set up. My only objection is that it is almost stultifying one's self to imagine such a possibility; but if the Lords Justices think it a proper course to take, I have no objection to insert the condition. (a) In my view of the case the petitioner is entitled to the relief that he asks. The costs will come out of the fund.

THE LORD JUSTICE KNIGHT BRUCE. — I am of the same opinion; the payment must be to the petitioner as administrator, and he must understand that he will have to distribute it according to the rights of the parties.

THE LORD JUSTICE TURNER. — This fund must be regarded as having been retained in Court either as a trust fund or as an indemnity fund in the sense of a fund retained to answer future demands. In 1719 the Court must have been perfectly well aware of what the rights and duties of the usher were, and the order then made appears to me to be conclusive as to the character in which the money was considered to remain in the hands of the usher; if it had been considered to be a trust fund in his hands, it would have been quite impossible for the Court in the face of that trust to have made an order for the payment of the dividends to the party who was still subject to the trust, and who had no interest under it. Then if the fund was not a trust fund in the hands of the usher, as I think the order of 1719 shows it was not, how could it be retained in Court as a trust fund? It could be retained only as an indemnity fund; and it is quite impossible to say at the present day that any claims for the purpose of answering which the fund was retained can be still existing. I think, therefore, that the order must be made for the payment of the fund.

(a) No such condition was introduced into the order.

* In the Matter of LISTER'S Hospital.

* 184

1855. December 19. Before the Lord Chancellor Lord CRANWORTH and the LORDS JUSTICES.

The assent of the charity commissioners is not requisite to an application for the disposal of money paid into Court by a railway company on the purchase of land belonging to a charity.¹

The words "in any suit or matter actually pending," in the 17th section of the Charitable Trusts Act, 1853, refer to a suit or matter actually pending at the time of the application.

THIS was a petition by the trustees of the hospital of Sir J. Lister, founded in 1640, part of the lands belonging to which had been taken by the York and North Midland Railway Company. The purchase-money had been paid into Court under the provisions of the Lands Clauses Consolidation Act, 1845; and the object of the present petition was to have a part of it applied in the purchase of other lands in substitution of the lands taken, a further part applied in the redemption of the land-tax, and the residue paid into the hands of the trustees for the general purposes of the charity. The case came on originally before Vice-Chancellor KINDERSLEY, who, referring to the 17th section of the Charitable Trusts Act, 1853 (16 & 17 Vict. c. 137), suggested a doubt whether he ought to make any order in the absence of the sanction of the charity commissioners, such sanction not having been obtained. The matter was discussed before his Honor, when it appeared that a uniform view of the practice was not taken in the different branches of the Court, and the Vice-Chancellor therefore simply declined to make the order, for the purpose of enabling the question to be brought before the Court of appeal.

The seventeenth section of the Act is in the following terms:
 "Before any suit, petition, or other proceeding (not being an application in any suit or matter actually pending) for obtaining any relief, order, or direction concerning or relating to any charity, or the estate, funds, property, or income thereof, shall be commenced, presented, or taken, by any person whomsoever, there shall
 * be transmitted by such person to the said board, notice * 185

¹ See 2 Dan. Ch. Pr. (4th Am. ed.) 311, 1852; *Braund v. Earl of Devon*, L. R. 3 Ch. Ap. 800.

in writing of such proposed suit, petition, or proceeding, and such statement, information, and particulars as may be requisite or proper, or may be required from time to time, by the said board, for explaining the nature and objects thereof; and the said board, if upon consideration of the circumstances they so think fit, may, by an order or certificate signed by their secretary, authorize or direct any suit, petition, or other proceeding to be commenced, presented, or taken with respect to such charity, either for the objects and in the manner specified or mentioned in such notice, or for such other objects, and in such manner and form, and subject to such stipulations or provisions for securing the charity against liability to any costs or expenses, and to such other stipulations or provisions for the protection or benefit of the charity, as the said board may think proper; and such board, if it seem proper to them, may, by such order or certificate as aforesaid, require and direct that any proceeding so authorized by them in respect of any charity shall be delayed during such period as shall seem proper to and shall be directed by such board; and every such order or certificate may be in such form, and may contain such statements and particulars, as such board shall think fit; and (save as herein otherwise provided) no suit, petition, or other proceeding for obtaining any such relief, order, or direction as last aforesaid shall be entertained or proceeded with by the Court of Chancery, or by any Court or Judge, except upon and in conformity with an order or certificate of the said board: provided always, that this enactment shall not extend to or affect any such petition or proceeding in which any person shall claim any property or seek any relief adversely to any charity.”

* 186 *Mr. Fowler*, for the petition, stated the facts of the * case, and the question on which the opinion of the Court was sought. It had been held, by the Master of the Rolls, *In re Markwell's Legacy*, (a) that the payment of a sum of money into Court under the Trustee Relief Act prior to the Charitable Trusts Act was not such “a suit or matter actually pending” as to relieve a party from the necessity of obtaining the assent of the commissioners to a subsequent application; and in another case, *In re The London, Brighton, and South Coast Railway Company*, (b)

(a) 17 Beav. 618.

(b) 18 Beav. 608.

which was precisely similar to the present, his Honor had come to the same decision. Vice-Chancellor Wood, however, *In re Cheshunt College*, (a) had held that the Court could make an order, directing the proceeds of the sale of the freehold parts of charity lands to a railway company to be invested in procuring the enfranchisement of the copyhold parts, without the sanction of the commissioners. He submitted that the view taken of the Act by Vice-Chancellor Wood was correct.

Mr. Hobhouse appeared for the railway company.

The Lord Chancellor, after consulting with the Lords Justices, said: We are all of opinion that the view submitted to us on behalf of the petitioners is the right one, and we concur with Vice-Chancellor Wood. The good sense of the matter is with the opinion expressed by his Honor, and there is nothing in the language of the Act against it. The object of the Act was to stop the enormous abuses which had grown up in the administration of charities in reference to proceedings which used to be instituted to the good of no one. It would, however, * be a very strong * 187 thing to say that if there is a matter in which the Court of Chancery ought to act, it cannot act until it is set in motion by the sanction of the charity commissioners. The legislature never intended thus to tie the hands of the Court: by "any suit or matter actually pending" is meant pending at the time of the application, not pending at the passing of the Act. In the present case, the matter being before the Court by the payment of the money, the petitioners were entitled to make an application for its investment, and to have the order made which they ask.

(a) 19 Jur. 995.

[147]

In the Matter of E. F. BLEWITT, a Lunatic,

and

In the Matter of The Act for the Abolition of Fines and Recoveries
(3 & 4 Will. 4, c. 74).

1855. November 23. December 18. 1856. February 8. Before the Lord
Chancellor Lord CRANWORTH and the LORDS JUSTICES.

Where the tenant in tail in possession is a lunatic, the Lord Chancellor has authority under the Act 3 & 4 Will. 4, c. 74, to consent to the first tenant in tail in remainder barring the subsequent limitations on a proper case being made out for the exercise of that authority.

The decisions in the cases of *Re Blewitt*, 3 Myl. & K. 250, and *Re Wood*, 3 Myl. & Cr. 266, overruled.

IN this case the lunatic, Edward Francis Blewitt, was tenant in tail in possession of the Llantarnam Abbey estate; and the petition was presented, in the matter of the lunacy and of the above Act by Reginald James Blewitt, the first tenant in tail in remainder of the same estate, praying the consent of the Lord Chancellor as protector to a resettlement of the property. The main question raised was whether the Lord Chancellor was, under these circumstances, authorized by the Act to give the consent prayed. The point having apparently been decided in the
* 188 negative * by Lord BROUGHAM and Lord LYNTHURST on petitions presented in this lunacy in 1834 and 1835, *Re Blewitt*, (a) and by Lord COTTENHAM, *Re Wood*, (b) the case was ordered to be heard by the full Court of appeal. The following is a short statement of the facts.

By indenture dated the 5th September, 1789, the will of John Blewitt, the uncle of the petitioner and of the lunatic, and indentures of lease and release dated the 30th September and 1st October, 1800, the Llantarnam Abbey estate was settled on Edward Blewitt, the brother of John Blewitt, for life, with remainder to the first and other sons of Edward Blewitt in tail male, with remainder to the daughters of Edward Blewitt in tail general, with remainder over to the collateral relations of John Blewitt.

(a) 3 Myl. & K. 250.

(b) 3 Myl. & Cr. 266.

Edward Blewitt died on the 8th March, 1832, leaving him surviving his eldest son, E. F. Blewitt, the lunatic; R. J. Blewitt, his second son, the petitioner; and a daughter, F. A. M. Blewitt, who subsequently, in June, 1834, married R. B. Dowling. Edward Blewitt had a third son, Edmund Blewitt, who died in his lifetime, leaving one daughter, Amelia Rose Blewitt; he had besides two daughters, who also died in his lifetime infants and unmarried.

By an inquisition, dated the 10th April, 1832, E. F. Blewitt, who was then the tenant in tail in possession of the Llantarnam Abbey estate, was found to be a person of unsound mind.

In March, 1834, the present petitioner, R. J. Blewitt, as the first tenant in tail in remainder of the estate, * presented a * 189 petition to the Lord Chancellor, praying that his Lordship would consent to such a disposition of the estate by the petitioner as would enable him to acquire an estate in fee-simple therein, saving only the right of persons in respect of estates prior to the estate tail vested in the petitioner. The Lord Chancellor (Lord BROUGHAM) refused to make any order, observing that, "according to the inclination of his opinion, the Act of Parliament did not give him any authority to interpose in such a case; but even assuming that he possessed such authority, he did not think that any sufficient ground had been stated in the petition to induce him to exercise a discretionary jurisdiction in the present instance." It appeared that in 1835 the petitioner presented another petition for a similar object to Lord Chancellor LYNDHURST, but it was withdrawn without any order being made upon it.

By indentures of lease and release, dated the 15th and 16th May, 1834, duly enrolled in Chancery, and made between the petitioner of the one part and W. Roberts of the other part, the Llantarnam Abbey estate was with other estates granted and released, subject to the estate in tail male therein of the lunatic, to such uses as the petitioner should by deed appoint, and in default of such appointment to the use of the petitioner and his assigns during his life without impeachment of waste, with remainder to the use of W. Roberts, his executors and administrators, during the life of and in trust for the petitioner, with remainder to the use of the heirs and assigns of the petitioner for ever.

The petitioner subsequently executed various mortgages of his interest in the estate. On the 1st May, 1855, these mortgages,

amounting to above 120,000*l.*, were vested in the official
 *190 managers of the Monmouthshire * and Glamorganshire
 Banking Company, of which the petitioner had been a
 managing director, and which was being wound up under the
 provisions of the Joint-stock Companies Winding-up Acts. The
 lunatic was a bachelor and of the age of fifty-six years, and was
 believed to be in a hopeless state of unsoundness of mind: the
 petitioner was fifty-five, and had for some time lived separate from
 his wife, who was fifty years of age and had no children. Mr.
 and Mrs. Dowling had two children, a son and a daughter, of the
 ages of fifteen and seventeen years respectively (their other chil-
 dren having all died in infancy): the interest of the parties enti-
 tled in remainder, namely, Anne Pumphrey, Margaret Macnamara,
 Jane Reece, and Frances Vaughan, was vested as to the three first
 in William Hearn, the devisee of their heir-at-law, and as to the
 last in Thomas Vaughan.

Under these circumstances, an agreement in writing, dated the
 1st May, 1855, was entered into between the official managers of
 the banking company of the first part, the petitioner of the second
 part, and Mr. and Mrs. Dowling of the third part: after reciting
 that questions had been raised as to the effect of the disposition
 made by the petitioner of the Llantarnam Abbey estate by the
 indentures of the 15th and 16th May, 1834, and that it was con-
 tended by and on behalf of Mr. and Mrs. Dowling and of their infant
 children that at the time of such disposition the Lord Chancellor,
 by reason of the unsoundness of mind of E. F. Blewitt, was in
 respect of the estate in tail male of E. F. Blewitt protector of the
 settlement by which that estate in tail male and the estate in tail
 male of the petitioner was created, and that the Lord Chancellor
 not having as such protector consented to the disposition, but
 having as such protector refused his consent thereto, the dispo-
 sition did not bar or affect the estate in tail general
 *191 * of Mrs. Dowling in remainder expectant on the estates
 in tail male respectively of the lunatic and the petitioner
 respectively, or the ultimate remainder in fee-simple absolute of
 Anne Pumphrey, Frances Vaughan, Margaret Macnamara, and
 Jane Reece, and passed only a base fee in remainder expectant
 on the estate in tail male of the lunatic to continue so long as the
 petitioner should have issue inheritable, or who but for his disposi-
 tion would have been inheritable under his estate in tail male,

and that it was contended by or on behalf of the official managers and the petitioner, that the Lord Chancellor was not protector of the settlement, and that such contention was supported by the opinions expressed or reported to have been expressed by Lord BROUGHAM and Lord LYNTHURST respectively on the occasions above referred to, and that it was further contended by or on behalf of the same parties that the said disposition operated to bar not only the petitioner's estate in tail male, but the estate in tail general in remainder of Mrs. Dowling and the estates in fee-simple in remainder of Anne Pumphrey, Francis Vaughan, Margaret Macnamara, and Jane Reece respectively, and to pass the Llantarnam Abbey estate and the fee-simple and inheritance thereof immediately expectant on the estate in tail male of the lunatic absolutely and indefeasibly to the uses limited and expressed of and concerning the same by the indenture of the 16th May, 1834, but that it was insisted by or on behalf of Mr. and Mrs. Dowling and their infant children that Lord BROUGHAM or Lord LYNTHURST respectively on the occasions before referred to did not nor did either of them determine the question whether the Lord Chancellor was or was not protector of the settlement; and further reciting that it was apprehended that, if the Lord Chancellor was such protector, the securities of the official manager, so far as the same consisted of a mortgage or charge of or on the Llantarnam Abbey estate, would fail and * determine if the petitioner should die with- * 192 out issue male and without having enlarged the said base fee into a fee-simple absolute, and that such enlargement could not be effected during the life of the lunatic, in case he should so long continue of unsound mind, without the consent of the Lord Chancellor, and that it was uncertain whether such consent would be or would not be given if opposed by or on behalf of Mr. and Mrs. Dowling and their infant children or any of them or by any future children of Mrs. Dowling, and that it was apprehended that if the Lord Chancellor was not such protector the estate in tail general of Mrs. Dowling might have been absolutely barred and defeated, and that she and her husband, and their infant children and the future children if any of Mrs. Dowling or any of them, could not derive any benefit from the Llantarnam Abbey estate in respect of the estate in tail general of Mrs. Dowling, and that it was further apprehended that if the Lord Chancellor was such protector the base fee which in that case was considered to have

been created by the indentures of the 15th and 16th May, 1834, in the Llantarnam Abbey estate might after the decease of the lunatic be so enlarged by the petitioner or his issue male if any into a fee-simple absolute for the benefit of the official managers to the extent of their charge thereon and subject thereto for the benefit of the petitioner, his heirs and assigns, to the exclusion of Mr. and Mrs. Dowling and the issue of Mrs. Dowling; and further reciting that it was considered doubtful whether the estate tail in remainder of Mrs. Dowling in the Llantarnam Abbey estate was bound by the covenant to settle after-acquired property contained in the marriage settlement of Mr. and Mrs. Dowling therein referred to, and that under the circumstances before mentioned it

was considered by the several parties to the agreement that
 * 193 it would be for their mutual benefit * and advantage, and for the benefit and advantage of the infant children and of the future children if any of Mrs. Dowling, if the aforesaid questions and every or any question if any which could or might be raised respecting the several estates, rights, or interests of the several parties thereto in the Llantarnam Abbey estate were compromised upon the terms hereinafter expressed: these terms, so far as it is necessary to notice them, in substance were, that the parties to the agreement should join in conveying and assuring the Llantarnam Abbey estate to trustees for an estate in fee-simple absolute, subject only to the estate in tail male of the lunatic, but freed and discharged from the securities of the official managers, upon trust, after the decease of the lunatic in case he should die without leaving issue male, to raise 35,000*l.* and to pay the same to the official managers, and subject to raising that sum to settle the estate upon the trusts of the marriage settlement of Mr. and Mrs. Dowling.

The present petition was thereupon presented by R. J. Blewitt, praying that the Lord-Chancellor, as protector of the settlement and in lieu of the lunatic, would consent to a disposition of the Llantarnam Abbey estate, and also certain bank annuities to which it is unnecessary more particularly to refer, upon the terms of the agreement of the 1st May, 1855, and that, if necessary, it might be referred to one of the Masters in lunacy to inquire and state whether it would be fit and proper that such consent should be given, or that an inquiry as to the propriety of giving such consent on behalf of the persons under disability or not *in esse*, might be

made in a suit to be instituted for that purpose under the direction of the Lord Chancellor.

The Solicitor-General, with whom was *Mr. Lewin*, in support of the petition. — * He stated the facts of the case, and * 194 in reference to the decision of Lord BROUGHAM observed that, according to the report, the matter had been very imperfectly presented to his Lordship, the counsel for the petitioner having so stated the effect of the Act of Parliament as to make it almost apparent that the Lord Chancellor had no jurisdiction. With regard to the other petition presented in 1835 to Lord LYNTHURST, he was able to state that, notwithstanding what appeared in the report, the fact really was, that it had been withdrawn without undergoing any discussion. In the case of *Re Wood*, (a) Lord COTTENHAM appeared on the point of jurisdiction to have simply followed the decision in *Re Blewitt*, without giving much attention to the subject. Taking, then, the case as unaffected by decision, and looking at the language of the twenty-second section of the Act, (b) it was submitted that the words “prior to * the * 195

(a) 3 Myl. & Cr. 266.

(b) The following is the section of the Act above referred to : —

“XXII. And be it further enacted, that if at the time when there shall be a tenant in tail of lands under a settlement, there shall be subsisting in the same lands, or any of them, under the same settlement, any estate for years determinable on the dropping of a life or lives, or any greater estate (not being an estate for years), prior to the estate tail, then the person who shall be the owner of the prior estate, or the first of such prior estates, if more than one, then subsisting under the same settlement, or who would have been so if no absolute disposition thereof had been made (the first of such prior estates, if more than one, being for all the purposes of this Act deemed the prior estate), shall be the protector of the settlement so far as regards the lands in which such prior estate shall be subsisting, and shall for all the purposes of this Act be deemed the owner of such prior estate, although the same may have been charged or incumbered, either by the owner thereof or by the settlor, or otherwise howsoever, and although the whole of the rents and profits be exhausted or required for the payment of the charges and incumbrances of such prior estate, and although such prior estate may have been absolutely disposed of by the owner thereof, or by or in consequence of the bankruptcy or insolvency of such owner, or by any other act or default of such owner; and that an estate by the curtesy, in respect of the estate tail, or of any prior estate created by the same settlement, shall be deemed a prior estate under the same settlement within the meaning of this clause; and that an estate by way of resulting use or trust to or for the settlor shall be deemed an estate under the same settlement within the meaning of this clause.”

estate tail" there used, did not refer to the first estate tail as such, but to the estate tail intended to be barred, and therefore that the words "any greater estate prior to the estate tail" must be held to comprehend any estate whatever, whether for life or in tail. This reading was consistent with the general intention of the Act, which was to substitute more simple modes of assurance for fines and recoveries, the consent of the protector standing in the place of the concurrence of the tenant to the immediate freehold. Assuming that the Court was of opinion that the case was within the Act, it was submitted that the circumstances showed that the Lord Chancellor would be fully justified in acting under the thirty-third and forty-eighth sections and in assenting to the arrangement proposed.

Mr. Malins and *Mr. Greene*, for the official managers of the banking company, also supported the petition.

Mr. G. M. Giffard appeared for Mr. and Mrs. Dowling.

Their Lordships, without expressly deciding the point of law, directed the case to stand over, in order that the petition might be served on the parties interested in remainder or some of them, observing that they ought to have the opportunity of being heard on the point of whether the discretion, which the Court was asked to exercise on behalf of the lunatic, ought to be exercised in the manner proposed.

December 18.

* 196 * The petition was again brought on.

The Solicitor-General shortly restated the facts.

Mr. Nelson, for W. Hearne, the devisee of the heir-at-law of three of the parties entitled in remainder. — Admitting that the Lord Chancellor was the protector, it was still submitted that the consent asked ought not to be given. In cases like the present, the Court always held an even hand between the heir-at-law and next of kin of a lunatic, and there was no instance in which the Court had ever gone so far as it was now asked to do. In the case of *Re Newman*, (a) the Lord Chancellor, Lord COTTENHAM, said:

(a) 2 Myl. & Cr. 112; see p. 116.

“As protector of the settlement, the only duty of the Court is to see what, with reference to the interests of the family, it would be proper for the tenant for life to do; and the object must be rather to protect the objects of the settlement, than to give any benefit to one member of the family to the exclusion of the others. Now, if nothing is done, one-sixth will go to this daughter, and her children if she has any, and if not, to the eldest son of the testator as his right heir: and I am asked to consent to that which will take it away from the eldest son, and take it away from the family, by giving it to the husband of the daughter. That would be any thing but protecting the settlement: it would be destroying the settlement; giving the estate to a person not a member of the family, namely, the husband of the daughter. I should not consider that it would be a proper act for the tenant for life to concur in a deed of disposition to that effect.” [He cited *Grant v. Yea*, (a) *Re Blewitt*, (b) and *Re Graydon*. (c)] The object of every settlement was to *keep the incumbrances *197 of each succeeding tenant in tail at bay by postponing the enlargement of the estate tail to the furthest possible period. In the present instance the lunatic would be the last person to sanction the course of proceeding which the Court in his place was now invited to adopt; and if the lunatic should recover, it would be impossible to restore him to his rights.

The Lord Chancellor said, that he entertained very little doubt upon the question before the Court; that it was necessary to look at the provisions of the Act, for if they were clear, the decisions which had been referred to, and which apparently were in conflict with them, would become immaterial. [His Lordship then read the twenty-second section of the statute, and observed that a tenant in tail in remainder was within the very words of the clause.] When a similar petition in this matter was before Lord BROUGHAM in 1834, the argument used was, that the lunatic being tenant in tail in possession, the equity of the Act might be extended in favour of the petitioner: that argument might or might not have been a good one if the case had not been within the very words of the Act, but it did not apply under the actual circumstances. Looking at the law as it stood previously to the abolition of fines and recoveries, and to the object of the Act, he (the Lord

(a) 3 Myl. & K. 245. (b) 3 Myl. & K. 250. (c) 1 M. & G. 655.

Chancellor) did not entertain the least doubt on the point, but he would not attempt to reconcile his own opinion with the decision of Lord BROUGHAM. It was said that the matter came a second time before Lord LYNTHURST, but this was not correct, the fact being that the petition was withdrawn. With respect to the

* 198 decision in *Re Wood*, (a) which * had also been relied on, it was to be observed that Lord COTTENHAM did not go into the question, but merely followed what had been previously done by Lord BROUGHAM.

The Court must therefore assume that the lunatic in this case was the protector of the settlement; and the question then was, whether under the circumstances, and the matter being entirely for the discretion of the Court, that discretion ought to be exercised. It was quite clear what the lunatic, if sane, would have done, having regard to what his sister might be entitled to. The arrangement contemplated by the petition seemed to be a most reasonable one; and as to there being no precedent for thus interfering with the rights of the lunatic where the lunatic had been such for above twenty years and the next in remainder was his brother, it was enough to say that the arrangement was just what the lunatic himself would have made; and the interests of the ultimate remainder-men were so extremely remote that they could not be taken into consideration.

His Lordship then adverted to the state of the lunatic's family, and said that the proposed settlement must provide for the children of the lunatic if he should have any, and there must be a reference to the Master in lunacy, who would take care that the settlement was in conformity with the proposed arrangement.

The Lord Justice TURNER observed, that the Court had expressed no opinion as to whether, if the lunatic was not protector of the settlement within the provisions of the twenty-second section, the case was not one in which the Court might exercise a discretion under the thirty-third section: the case might, in the

* 199 * event alluded to, be held to fall within the latter clause of that section. (b)

(a) 3 Myl. & Cr. 266.

(b) The following is an outline of the order made in conformity with the above decision:—

Whereas, &c. Now upon hearing the said petition, &c. And being of

In pursuance of the order carrying out the foregoing decision, F. BARLOW, Esq., the Master to whom the matter was referred, made his report dated the 5th February, 1856, whereby, after reciting the order, and that he had been attended by counsel and solicitors for the different parties, and that there had been laid before him the drafts of a conveyance and of a settlement for carrying out the arrangement (describing each of them shortly), and that he had in the presence of counsel and solicitors so attending read and considered the said two drafts of conveyance and settlement and what was alleged by them respectively, he certified that he had settled and approved of * the said drafts * 200 of conveyance and settlement as proper deeds for carrying into effect the arrangement.

1856. February 8.

The petition was again placed on the paper of the Lords Justices.

The form of the proposed deeds, which had been engrossed, was stated to their Lordships by the counsel for the petitioner in the presence of the counsel for the official managers and for Mr. and Mrs. Dowling.

Their Lordships directed the drafts of the proposed deeds to be left with them, and stated that they would look over them, and intimate their approval or disapproval thereof at a future time. (a)

opinion that we, as the persons intrusted by the Queen's sign-manual with the care and commitment of the custody of the persons and estates of persons found lunatic, idiot, or of unsound mind, are protectors in lieu of the said Edward Francis Blewitt, the lunatic of the settlement made by, &c., in the petition mentioned, and that the arrangement in the petition mentioned with respect to the estates settled is a proper one to be entered into on behalf of the said lunatic, do order that it be referred to the Masters in lunacy to settle and approve of a proper deed or deeds for carrying into effect the said arrangement: and we do order that the reasonable and proper costs and expenses of the said William Hearne of appearing upon this application be taxed, and that the amount thereof to be certified by the taxing master be paid by the petitioner Reginald James Blewitt, &c. And we do reserve all further directions until after the Master's certificate of approval of the said deed or deeds shall have been made.

(a) The Lords Justices accordingly made an order, dated the 26th February, 1856, in the following terms:—

We do order that the aforesaid order of the 18th day of December, 1855, be varied so far as the same approves of the arrangement in the said petition mentioned, and as protector of the settlement in the place of the said lunatic under and by virtue of the above-mentioned Act of Parliament of the estates and bank

* 201 In the Matter of E. H. DALTON, an Infant, by E. DALTON,
her Father and next Friend ;

and

In the Matter of The Act for enabling Infants with the Approbation
of the Court of Chancery to make binding Settlements of their
Real and Personal Estate on Marriage (18 & 19 Vict. c. 43).

1856. July 30. Before the Lord Chancellor Lord CRANWORTH.

On a petition by a female infant under the Act 18 & 19 Vict. c. 43, praying a
reference to approve of a proper settlement, and stating that the intended
marriage had the sanction and approbation of the infant's father: The Lord
Chancellor made the order without directing any inquiry as to the propriety
of the marriage.

The provisions of the Act do not impose on the Court any other duty than that
of looking to the propriety of the settlement, though this may sometimes lead
to an inquiry as to all the circumstances connected with the marriage.

THIS was a petition by E. H. Dalton, an infant of the age of
twenty years, by E. Dalton, her father and next friend, praying
that it might be referred to the chambers of Vice-Chancellor
STUART to approve of what was a proper settlement to be made by
the infant of her property previously to her intended marriage
with A. Turner, and that the infant might be at liberty and directed
to execute such settlement after the same should have been duly
approved and settled by or under the direction of the Court.

The petition stated an indenture of settlement made on the mar-
riage of the father and mother of the infant, under which the infant
was entitled after the death of her father to a sum of 15,052*l.* 16*s.*
consols standing in the names of trustees on her attaining twenty-
one or dying under that age leaving lawful issue; the will of a

annuities comprised in the parchment writings now produced to us and marked
with the letters A. and B., of which estates and annuities the said lunatic is
tenant in tail in possession. We do think fit to and do hereby consent to the
said petitioner Reginald James Blewitt barring his estate tail and the remainders
over in the said estates and annuities for the purpose of enabling the said estates
and annuities to be limited and settled to the uses and upon the trusts to be
created and declared by deeds to be executed according to the said parchment
writings produced to us as aforesaid, and we do declare the aforesaid consent to
be limited to the purpose aforesaid and to giving full effect to the said deeds.

deceased uncle of the infant, under which she was entitled to have paid to her part of a sum of 400*l.* * during her * 202 minority and the remainder on her attaining twenty-one ; and the will of another deceased uncle, under which she was entitled to a sum of 800*l.* (since invested in 870*l.* consols) on attaining twenty-one or marrying under that age with the consent of her father : it then stated that a marriage had with the sanction and approbation of the infant's father been lately agreed upon and was intended to be very shortly had and solemnized between the infant and A. Turner, and that upon the treaty for the intended marriage it was arranged and agreed that the two sums of 15,052*l.* 16*s.* and 870*l.*, stock, and the sum of 200*l.*, part of the 400*l.*, should previously to the solemnization of the intended marriage be settled and assured upon and become subject to the trusts of an indenture of settlement, the terms and provisions whereof had been fully considered and discussed and (subject to the approbation of the Court) agreed on by the intended parties to such indenture, that the draft of an indenture of settlement embodying such terms and provisions had been drawn and had been perused and approved of by counsel on behalf of the infant, that the petitioner was desirous that the same should be finally settled and approved by and under the direction of the Court, and that the petitioner should under the provisions of the above-mentioned Act, with the sanction and approbation of the Court, previously to her intended marriage make and execute a valid and binding settlement of her said property.

The petition came on before Vice-Chancellor STUART on the 18th July, 1856, when his Honor made an order that the matter of the petition should be adjourned to chambers, in order that the chief clerk might inquire and certify whether it was fit and proper and for the benefit of the infant that any and what settlement should * be made of her property previously to her proposed * 203 marriage with A. Turner, and whether the proposed marriage was a fit and proper marriage, having regard to the character and fortune of A. Turner.

The case was then brought by way of appeal before the Lords Justices, it being submitted, on the part of the petitioner, that under the provisions of the Act no reference as to the fitness of the marriage ought to have been directed. Their Lordships, however, regarding the question as one of general importance regulating the construction to be put on the Act, suggested that the matter should

be mentioned to the Lord Chancellor, and it now came on before his Lordship accordingly.

The first section of the Act, being that under which the application was made, is as follows: "From and after the passing of this Act it shall be lawful for every infant, upon or in contemplation of his or her marriage, with the sanction of the Court of Chancery, to make a valid and binding settlement or contract for a settlement of all or any part of his or her property, or property over which he or she has any power of appointment, whether real or personal, and whether in possession, reversion, remainder, or expectancy; and every conveyance, appointment, and assignment of such real or personal estate, or contract to make a conveyance, appointment, or assignment thereof, executed by such infant with the approbation of the said Court for the purpose of giving effect to such settlement, shall be as valid and effectual as if the person executing the same were of the full age of twenty-one years. . . ."

Mr. Malins and Mr. Roxburg, in support of the petition. —

* 204 * The Vice-Chancellor's construction of the Act was, that any application under it by an infant for the purpose of obtaining the sanction of the Court to enable a valid settlement to be made constituted the infant a ward of Court and imposed upon the Court the obligation to inquire also as to the propriety of the marriage, as otherwise the Court might be called on to approve a settlement on a highly improper marriage. We submit, on the other hand, that an inquiry into the propriety of the marriage is wholly foreign to the purpose of the Act. The construction of the Vice-Chancellor will in effect make the Act a dead letter; and the result in the present instance would be, that the proposed marriage, having the entire approbation of the infant's father, would be solemnized without the parties availing themselves of the benefit contemplated by the Act.

THE LORD CHANCELLOR. — I take it that the only meaning of the Act was, that the Court should be satisfied that there is a proper settlement. I do not think the meaning of the Act was, that parties who are infants could not marry without the sanction of the Court. As soon as the chief clerk has approved of the settlement, I will myself look into it, in the place of the Vice-Chancellor.

His Lordship, on being informed that the Lords Justices appar-

ently differed in opinion as to the construction to be put upon the Act, added, that as at present advised he was of opinion that it was not within the scope or intention of the Act that an application under it should constitute the applicant a ward of Court; that the inquiry in the present case would therefore be limited to the propriety of the settlement, though he should not, on the occasion of any * similar application in future, consider * 205 himself bound to adopt the same form of order.

August 5.

The Lord Chancellor mentioned the case again, and said that he had considered the provisions of the statute, and was of opinion it was not intended to impose on the Court any other duty than that of looking to the propriety of the settlement, though what in each particular case might be a proper settlement must sometimes lead to an inquiry as to all the circumstances connected with the marriage.

WILKS v. GROOM,

AND

In the Matter of The Trustee Acts, 1850 and 1852.

1856. August 5. Before the Lord Chancellor Lord CRANWORTH.

A testator devised lands in trust to sell for the payment of debts: the trustees disclaimed, and the heir-at-law could not be found: the lands were sold under a decree in a suit for administration, and an order was obtained under the Trustee Act, 1850, appointing the vendor's solicitor to convey to the respective purchasers: *Held*, by the Lord Chancellor, on the question being raised by one of the purchasers, that the provisions of the 9th and 20th sections of the Trustee Act, 1850, applied to the case, and that the order which had been made was correct.

THIS was the petition of John Joad, a purchaser under the decree in the suit, and it raised a question of general importance on the construction of the above Acts. The following short statement will explain the facts of the case, and the point submitted for the opinion of the Court.

John Hooper, by his will dated the 2d December, 1847, devised

and bequeathed all his real and personal estate to trustees, upon trust to sell and to apply the proceeds in payment of his * 206 debts, and subject thereto * for other purposes which he specified. The testator died on the 17th July, 1851, and by a deed-poll dated the 5th May, 1852, the trustees disclaimed the trusts of the will. On the 30th June, 1852, the present suit was instituted for the purpose of administering the estate, and by a decree made by Vice-Chancellor KINDERSLEY on the 16th April, 1853, a sale was directed. Under this decree the testator's estates were put up to sale at different times; and on the 15th July, 1854, part of the property, consisting of two freehold houses at Ramsgate, was purchased by John Joad for 500*l*. It not being known who was the testator's heir-at-law, the usual proceedings had been adopted for the purpose of ascertaining if possible who that person was; and the chief clerk, by his certificate dated the 25th February, 1854, found that there was no heir-at-law *ex parte paternâ* living at the time of the testator's death, but that no evidence had been laid before him whereby he was enabled to state whether the testator left any heir-at-law *ex parte maternâ* him surviving.

Shortly after the sale to J. Joad, the plaintiff in the suit, who was the administratrix with the will annexed of the testator and one of the persons interested under the trusts of the will, presented a petition in the suit and in the matter of the Trustee Act, 1850, stating the above facts, and praying that W. W. Gabriel might be appointed trustee for the purpose of granting and conveying the estates of the testator to the respective purchasers thereof; and on this petition an order was made by Vice-Chancellor KINDERSLEY, dated the 2d August, 1854, in the following terms: "This Court doth order that Mr. William Wallace Gabriel, the solicitor of the petitioner, be appointed to convey the freehold lots numbered respectively 1 and 2, . . . to the respective purchasers * 207 thereof, their heirs and assigns, * such conveyances to be settled by the Judge to whose Court this cause is attached in case the parties differ about the same."

In pursuance of an order made in the cause, dated the 3d August, 1854, J. Joad paid his purchase-money into the bank, and was let into possession of the premises purchased by him, being lot 2 referred to in the order of the 2d August, 1854.

A question was then raised as to the form of the conveyance to be given to J. Joad, the plaintiff proposing that the conveyance

should be made by W. W. Gabriel under the order of the 2d August, 1854, but J. Joad objecting to this on the ground that he was advised that the proposed conveyance would be inoperative to vest in him any legal estate. The present petition was then presented by J. Joad, for the purpose of determining this question: it stated the above facts, and prayed the appointment of new trustees of the will of the testator, and that they might be directed to convey to the petitioner the premises sold to him.

The petition came on before Vice-Chancellor KINDERSLEY on the 11th July, 1856, when his Honor, considering the question to be one of general importance on the construction of the Trustee Acts, declined to make any order, and suggested that the matter should be brought under the notice of the Lord Chancellor.

The ninth and twentieth sections of the Trustee Act, 1850, on which the decision of the question thus raised depended, are as follow :—

“ IX. And be it enacted, that when any person solely seised or possessed of any lands upon any trust shall be out of the jurisdiction of the Court of Chancery, or * cannot be found, * 208 it shall be lawful for the said Court to make an order vesting such lands in such person or persons in such manner and for such estate as the said Court shall direct; and the order shall have the same effect as if the trustee had duly executed a conveyance or assignment of the lands in the same manner and for the same estate.”

“ XX. And be it enacted, that in every case where the Lord Chancellor intrusted as aforesaid, or the Court of Chancery, shall, under the provisions of this Act, be enabled to make an order having the effect of a conveyance or assignment of any lands, or having the effect of a release or disposition of the contingent right of any person or persons born or unborn, it shall also be lawful for the Lord Chancellor intrusted as aforesaid, or the Court of Chancery (as the case may be), should it be deemed more convenient, to make an order appointing a person to convey or assign such lands, or release or dispose of such contingent right; and the conveyance or assignment, or release or disposition of the person so appointed shall, when in conformity with the terms of the order by which he is appointed, have the same effect in conveying or assigning the lands, or releasing or disposing of the contingent right, as an order

of the Lord Chancellor intrusted as aforesaid, or the Court of Chancery, would in the particular case have had under the provisions of this Act. . . .”

Mr. Wickens, for *Mr. Joad*, and in support of the objection to the proposed form of conveyance. — He stated that the doubt as to the sufficiency of the proposed conveyance by *W. W. Gabriel* had been raised by very competent persons by whom the purchaser had been advised that the case of an unknown heir of a person
 * 209 seised of lands, not as trustee, but beneficially * in his own right, although those lands might have been sold for the payment of debts under the decree of the Court, was not provided for by the Trustee Acts, that the order of the 2d August, 1854, could not be supported, and that the proper course for obviating the difficulty was to obtain the appointment of new trustees as prayed by the present petition, to have the legal estate vested in them, and afterwards to cause them to convey to the purchaser. [He referred to the ninth and twentieth sections of the Trustee Act, 1850.]

Mr. Baily and *Mr. G. W. Collins*, for the plaintiff. — They submitted that the order of the 2d August, 1854, was correct, and that the present case fell within the terms of the sections of the Act to which reference had been made.

The Lord Chancellor said that he did not see the difficulty suggested on behalf of the purchaser. It was hardly possible to make the matter clearer than it was made by the language of the Act itself. Applying the terms of the ninth section to the case, there was here a person solely seised, the heir-at-law of the testator (the trustees appointed by the will having disclaimed), and there had been a decree made in the suit in his absence. The heir was thus in fact a trustee who could not be found; and under these circumstances the Court had power to make an order vesting the property in such person or persons in such manner and for such estate as the Court might direct. Then under the terms of the twentieth section, wherever the Court might have made a vesting order it might make instead an order appointing a person to convey. There did not seem to be any difficulty; and his Lordship thought that the Act applied to the present case, and that the order of the 2d August, 1854, was right.

* WICKENDEN v. RAYSON.

* 210

1855. November 10. Before the Lord Chancellor Lord CRANWORTH.

In a creditors' suit for the administration of real estate subject to a mortgage having priority to the claims of creditors, a sale of the estate free from the mortgage cannot be directed without the consent of the mortgagee, whether he is a party to the suit or not.¹

If, however, the mortgagee is a party to the suit, the direction will not be made in the common alternative form, namely, that the property shall be sold free from his security if he concurs in the sale and subject to it if he does not concur; but the Court will require the mortgagee to elect at once whether he will concur or not.

THIS was an appeal by the defendant G. B. Acworth from an order, made on further directions by Vice-Chancellor STUART, so far as it directed him to concur in a sale of the property ordered to be sold in the cause, and made him in a certain event specified liable to pay the costs of the suit.

The suit was instituted by creditors for the administration of the real and personal estate of Henry James Rayson, who died on the 8th December, 1851, leaving a will by which he gave his property to his wife Mary Rayson for life, and after her death to his two daughters, Ann the wife of Thomas Henley, and Mary Rayson: the widow was appointed executrix.

On the 10th June, 1852, the widow and two daughters and the husband of the married daughter mortgaged the property to the defendant G. B. Acworth to secure 400*l.* and further advances, which advances were subsequently made to the amount of 700*l.* in all. On the 19th June, 1852, the same parties transferred the equity of redemption to trustees in trust to sell, to invest the proceeds, and hold them in trust for the widow for life, and after her death for her sons J. H. Rayson and Edward Rayson, her son-in-law the said Thomas Henley, and her said daughter Mary Rayson in equal shares. On the 24th July, 1852, the widow and T. Henley mortgaged their interests under this settlement to the defendant G. B. Acworth to secure 150*l.* advanced by him to T. Henley; and on the 20th August, 1852, the widow * and * 211

¹ See 2 Dan. Ch. Pr. (4th Am. ed.) 1264, 1265.

J. H. Rayson made a similar mortgage to the defendant G. B. Acworth to secure 150*l.* advanced by him to J. H. Rayson.

Shortly after the execution of the last-mentioned mortgages the present suit was instituted: G. B. Acworth was not made a party to it, as the bill did not seek to impeach his mortgage for 700*l.*, but asked that directions might be given for redeeming it, the plaintiffs in fact having no knowledge of the other mortgages. After the answers had been put in which disclosed the existence of the two mortgages for 150*l.*, G. B. Acworth was made a party by amendment, and the bill as amended prayed that the settlement of the 24th July, 1852, and the mortgages made under it might be declared fraudulent and void as against the creditors, but it did not impeach the mortgage for 700*l.* The grounds on which the mortgages for 150*l.* were impeached need not be stated for the purpose of the present report.

After various proceedings, the cause came on before Vice-Chancellor STUART on further directions, when his Honor decided that the settlement and the mortgages made under it were void as against the creditors, and ordered a sale of the devised estates, directing that the 700*l.* and interest should in the first place be paid out of the proceeds of the sale, and then the plaintiffs' debt and costs, and that if the proceeds of the sale were insufficient for that purpose the defendants, including the defendant G. B. Acworth, should pay the plaintiffs' costs. The question as to costs was argued, but the point as to whether the property should be sold free from the 700*l.* mortgage was not discussed.

Before the decree had been passed and entered, the defendant G. B. Acworth applied on motion before *the Vice-Chancellor to vary the minutes as to the sale, by substituting the usual direction that the property should be sold subject to his mortgage of 700*l.* if he should not concur in the sale, and free from it if he should concur. His Honor, however, refused the application, holding that as G. B. Acworth was a party to the suit, the Court had jurisdiction to compel him to concur in the sale. The decree was therefore drawn up in the form originally directed, and the present appeal was brought by the defendant G. B. Acworth.

Mr. Craig and *Mr. Bevir*, for the defendant G. B. Acworth, supported the appeal. — They contended that according to the long

settled practice of the Court, no sale could as against a mortgagee claiming by a title paramount, whether a party to the suit or not, be ordered without his consent except subject to his mortgage: *Langton v. Langton*; (a) and here the mortgagee did not consent. The Vice-Chancellor seemed to have thought that the forty-eighth section of the Act 15 & 16 Vict. c. 86 applied, but that section was in express terms confined to suits for foreclosure. They also submitted that the direction as to costs was wrong. They cited *Tippling v. Power*, (b) *Hepworth v. Heslop*; (c) and referred to *Harvey v. Tebbutt*. (d)

Mr. W. D. Lewis, who was with *Mr. Malins*, for the plaintiffs, submitted that the decree was right. — He contended that the case of *Langton v. Langton* (a) was distinguishable from the present, for there the mortgagee had been improperly made a party, the attempt to impeach his security having failed, so that he might * fairly be treated as not before the Court; but here * 213 the mortgagee was properly a party to the suit. As to the costs they were originally in the discretion of the Court, and ought not to form the subject of an appeal. He insisted that the present application was frivolous and unreasonable, the property being more than sufficient to pay off the first mortgage, so that under the decree as it stood the appellant would get every thing that he was entitled to.

Without calling for a reply, the Lord Chancellor said, that there could be no doubt about the case, and the Vice-Chancellor could never have meant to interfere with the clear rule of the Court, that a sale cannot be directed against a mortgagee without his consent. The only difference in practice in cases of this kind was that where the mortgagee was a party to the suit, the Court would not make the order in the usual alternative form, but would put it at once to the mortgagee whether he would consent to a sale or not. If there was not a precedent for doing this, one might now be made. In the present case the mortgagee by his counsel had declined to consent to a sale, and therefore, acting upon the general rule, the decree made ought to be varied thus, — the defendant G. B. Acworth not consenting to a sale of the property,

(a) 3 Eq. Rep. 394.

(c) 3 Hare, 485.

(b) 1 Hare, 405.

(d) 1 J. & W. 197.

let the same be sold subject to his mortgage. As to the costs, nothing need be said about them until the result of the sale was known. Further directions and costs would therefore be reserved. With regard to the present appeal, there should be no costs, and the deposit should be returned.

1856. June 4. July 5, 9. Before the Lord Chancellor Lord CRANWORTH.

A manufacturer who has adopted a trade-mark to designate some particular article as made by him has a right to the assistance of the Court to prevent any one from so using the same or any similar mark as to induce purchasers to believe, contrary to the fact, that they are buying that particular article to which the mark was originally applied.²

In a case, however, where the mark consisted of a label in a certain form, and it was shown that in very many instances labels the same as or similar to it might be sold for a legitimate purpose, the Court, in the absence of any proof of actual fraud, refused to restrain the printing and sale of such labels until the manufacturer, who alleged that they were used for a fraudulent purpose, had established his case by an action at law.³

THIS was an appeal by the defendant H. Silverlock seeking to set aside an order, made by Vice-Chancellor Wood on the hearing of the cause, making perpetual an injunction restraining him, the defendant, from printing or selling or exposing for sale or procuring to be printed or sold any labels similar to those in use by the plaintiff as in the bill mentioned, or containing copies of the signature or address or flourish, seal or stamps, or other marks invented and used by the plaintiff as in the bill mentioned, or any signature

¹ S. C., 1 De G. & J. 434.

² 2 Dan. Ch. Pr. (4th Am. ed.) 1648, 1649, and cases in notes (1), (2), (3); Brooklyn White Lead Co. *v.* Masury, 25 Barb. 416; Taylor *v.* Carpenter, 3 Story, 458; 11 Paige, 392; 2 W. & M. 1; Marshall *v.* Ross, L. R. 8 Eq. 651; Lee *v.* Haley, L. R. 5 Ch. Ap. 155; Kerr Inj. 475; Leather Cloth Co. *v.* American Cloth Co., 11 H. L. Cas. 523, 528; Seixo *v.* Provezende, L. R. 1 Ch. Ap. 192; Boardman *v.* Meriden Britannia Co., 36 Conn. 207; Emerson *v.* Badger, 101 Mass. 82; Burgess *v.* Burgess, 3 De G., M. & G. 896, n. (1), and cases cited.

³ See Farina *v.* Silverlock, 1 De G. & J. 434.

or address or flourish, seal or other marks, invented and used by the plaintiff as in the bill mentioned, or any signature, address, flourish, seal, or other mark merely colourably differing therefrom or any papers or labels so printed or contrived as to be colourable imitations.

The plaintiff, Johann Maria Farina, claimed to be the owner of a valuable secret in the manufacture of *eau-de-cologne*: he stated by his bill, that for the purpose of distinguishing his *eau-de-cologne* from that of others, he had invented a particular form of label which he pasted on the bottles which he sold; that the defendant had printed and sold labels, being either copies of or only colourably differing from this label; that thereby great quantities of spurious *eau-de-cologne*, made to resemble the plaintiff's, had been sold as the plaintiff's; and that thereby the plaintiff had been greatly injured. The bill prayed an injunction against the printing and selling of the labels.

* In June, 1855, Vice-Chancellor Wood, on an interlocutory motion, granted an injunction in the terms above * 215 stated, the evidence and the facts of the case being then, in all substantial particulars, the same as at the subsequent hearing. A full report of the case, as brought before the Court in June, 1855, will be found in the first volume of Messrs. Kay & Johnson's Reports, page 509; and as the facts are also noticed in the judgment of the Lord Chancellor, it becomes unnecessary to enter into any further detail of them for the purpose of the present report.

Mr. Daniel and *Mr. Hetherington*, for the plaintiff, supported the order made by the Vice-Chancellor.—It was alleged by the defendant, that the plaintiff had no right to the trade-mark, but this right was clearly established. The Vice-Chancellor had thus stated his view on this part of the case: (a) “Then with respect to the evidence: there never was a case, I should think, in which the right to the use of a trade-mark was so clearly established as it is by the plaintiff in this case. I do not know when such a right can ever be established if it is not here.” The defendant also alleged that he had a right to print and sell the label, because it was not shown that it affected the plaintiff's property: the defendant was, however, clearly enabling a fraud to be committed on the plaintiff;

(a) 1 K. & J. 517.

he was printing not the real label, but a colourable imitation of it; and it was submitted, that the Court would not wait to interfere until it was shown that the fraud had been actually completed. [They referred to *Delondre v. Shaw* (a) and *Crossley v. Beverley*. (b)]

Mr. Willcock and *Mr. Buxton*, for the defendant appeal.
* 216 ing. — * The bill does not contain any facts on which to found the equity asserted by the plaintiff. In order to maintain that equity, one or other of four states of circumstances must exist; either the plaintiff must show a legal right, or the defendant must be proved to stand in a fiduciary position towards the plaintiff, or there must be something amounting to a contract, or there must be clear evidence of fraud. With respect to the plaintiff's legal right, it is well settled that there is no property in a trade-mark distinct from its use: thus in *Blanchard v. Hill*, (c) Lord HARDWICKE says, "Every particular trader has some particular mark or stamp, but I do not know any instance of granting an injunction here to restrain one trader from using the same mark with another, and I think it would be of mischievous consequence to do it;" and on the same principle, Sir L. SHADWELL, in *Delondre v. Shaw*, (d) says, "I cannot intend a fraud where none is alleged." The cases of *Motley v. Downman*, (e) *Perry v. Truefitt*, (g) *Croft v. Day*, (h) *Rodgers v. Nowill*, (i) and *Clark v. Freeman*, (k) are all to the same effect. The present is quite distinguishable from the cases of *Morison v. Moat* (l) and *Knott v. Morgan*, (m) the former of which was a case of breach of confidence, and the latter was one of fraud, the Master of the Rolls there saying, "They (the plaintiffs) have a right to call upon this Court to restrain the defendant from fraudulently using precisely the same words and devices which they have taken for the purpose of distinguishing their property." The bill here contains no allegation that the defendant sold the labels as the labels of the plaintiff, but this is an essential ingredient in all cases like the

(a) 2 Sim. 237.

(b) 1 Russ. & Myl. 166.

(c) 2 Atk. 484.

(d) 2 Sim. 237, 240.

(e) 3 Myl. & Cr. 1.

(g) 6 Beav. 66.

(h) 7 Beav. 84.

(i) 6 Hare, 325.

(k) 11 Beav. 112.

(l) 9 Hare, 241.

(m) 2 Keen, 213.

*present, where the interference of the Court is invoked. * 217
The presumption of fraud is further rebutted by the fact of the plaintiff being himself the purchaser from the defendant. A man may legitimately sell poison, and not be responsible for the consequences. [The cases of *Sykes v. Sykes* (a) and *Canham v. Jones* (b) were also mentioned in the course of the argument.]

Mr. Daniel replied. — The suggested case of selling poison has no analogy to the present, because the vendor there is not disposing of other men's goods. [He referred to the observations of Vice-Chancellor KNIGHT BRUCE in *Prince Albert v. Strange*. (c)]

The Lord Chancellor, after stating the general object of the appeal, said: The plaintiff's equity is founded on the jurisdiction of this Court to give relief in the shape of preventive justice in order to make more effectual a legal right, the legal right here being a right to have a particular trade-mark to designate a commodity. This right cannot be properly described as a copyright,¹ it is in fact a right which can be said to exist only and can be tested only by its violation, it is the right which any person designating his wares or commodities by a particular trade-mark, as it is called, has to prevent others from selling wares which are not his marked with that trade-mark in order to mislead the public, and so incidentally to injure the person who is owner of the trade-mark.² The principle applicable to such cases has been often discussed, and although there may be one or two instances in the books in which a little difficulty may occur in the application of it, there is no difficulty in knowing what the principle is. Judges may occasionally * have erred in the application of the law * 218 to particular facts; but I apprehend that the law is per-

(a) 3 B. & C. 541. (b) 2 V. & B. 218. (c) 2 De G. & S. 652.

¹ See 2 Dan. Ch. Pr. (4th Am. ed.) 1648.

* The jurisdiction in such cases rests upon property, and not upon the fraud on the public; and, therefore, will not be exercised, unless it appears that the plaintiff has sustained, or is likely to sustain, pecuniary loss from the acts complained of. 2 Dan. Ch. Pr. (4th Am. ed.) 1648 and cases in note (5); *Edelsten v. Edelsten*, 1 De G., J. & S. 185; *Leather Cloth Co. v. American Cloth Co.*, 11 H. L. Cas. 523. But it is sufficient to show that a general injury has been done to the plaintiff; special damage need not be averred. *Dent v. Turpin*, 2 J. & H. 139; *Kerr Inj.* 480. As to the rule of damages, see *Taylor v. Carpenter*, 2 W. & Minot, 1.

fectly clear, that any one who has adopted a particular mode of designating his particular manufacture, has a right to say, not that other persons shall not sell exactly the same article, better or worse, or an article looking exactly like it, but that they shall not sell it in such a way as to steal (so to call it) his trade-mark, and make purchasers believe that it is the manufacture to which that trade-mark was originally applied.

The principle I have just described is the foundation of the present bill. The plaintiff, Johann Maria Farina (whether descended from a line of ancestors who for a hundred and fifty years have manufactured the article or not is utterly unimportant to the case), is the well-known manufacturer of *eau-de-cologne*; and what he says is, that since the year 1832 the article manufactured by him has been known throughout Europe and in this country by a particular trade-mark, a certain flourish with his name of "Johann Maria Farina gegenüber dem Jülichs Platz," written in a particular way with certain marks and dots about it; he says that that is the mode by which he designates his *eau-de-cologne*, and that the defendant, who is a printer and sells labels for patent medicines and articles of that description, has been in the habit of printing spurious labels, either exactly the same as or only colourably differing from his, and selling them, whereby he, the plaintiff, has been defrauded, because the labels are applied to other *eau-de-cologne* than that manufactured by him.

The facts seem to be clear, that a person employed by the plaintiff, on a given day in January or February last year, went to the shop of the defendant, who is undoubtedly to a very large extent

the printer of these labels, and purchased one hundred
 * 219 labels for this *eau-de-cologne* * for which he paid eighteen pence, and they are the same or nearly the same as those which are the genuine trade-mark of the plaintiff. Having purchased these hundred labels, the plaintiff filed his bill to restrain the defendant from continuing to print or sell such labels, and obtained the decree that is now sought to be reversed.

There is one view of this case which I doubt very much whether it was quite present to the mind of the Vice-Chancellor, who seems to have taken great pains in his judgment, and I never differ from his Honor without hesitation. It, however, seems to me clear, that any man who had got the *eau-de-cologne* of Johann Maria Farina, but had not got a label, might employ any printer he thought

fit to print or engrave for him a label which should be an exact counterpart of that which was used by Johann Maria Farina; for there is no copyright in it. All that the law restrains a person from doing is, selling the article which is not the manufacture of Johann Maria Farina with the label of Johann Maria Farina upon it; but if it be the article which has been manufactured by Johann Maria Farina, it can be no ground of complaint by Johann Maria Farina that the person sells it with something upon it to represent his trade-mark, though it is not a genuine trade-mark. The gist of the case in an action at law would be this, that he had sold, as and for the manufacture of the plaintiff, something that was not his manufacture, and that the supposed spurious label was put on in order to make it more apparent that it was so. I think it clear, therefore, that any man would be at liberty, if it was writing instead of printing, to write, or, if he was capable of printing and engraving, to print and engrave for himself, a label being a colourable imitation of or a copy of the plaintiff's label, and to put it on *eau-de-cologne* being the *eau-de-cologne* of the plaintiff.

* The case of the defendant is put in a very rambling * 220 way, and he has gone into circumstances that are entirely irrelevant, about who was the inventor of the *eau-de-cologne*; but I think I collect his defence is this, or at least this among other things, namely, that there are persons in this country who want these labels for legitimate purposes. He says in the last paragraph of his first affidavit, "I believe that the plaintiff is well acquainted with the fact and custom of supplying to retail dealers the labels and wrappers with which their goods are sold, and that such practice is not only a most expedient and convenient course of commerce, but also indispensable for the convenience of retail dealers" (that is, the retail dealers in the genuine article), "who are obliged frequently in the course of their trade to change the wrappers and labels which accompany the articles in which they deal, and to replace those which are soiled or spoiled by being exposed in their respective shops and warehouses for long periods before they are sold." The same statement is repeated in two or three other affidavits, and it amounts to this, — that there are persons selling Johann Maria Farina's *eau-de-cologne* all over the country who are continually in want of these labels; they get it perhaps in a large bottle and find it more convenient to retail it in smaller bottles, and thus a number of wrappers are required,

and there is a continual demand for them. I cannot say that I think that this statement is at all contradicted; it is true that the plaintiff says that he is not aware that there is such a demand, but he does not contradict it. I think this a material ingredient in considering the equities in this case; because if the defendant may legitimately for some purposes print and sell these labels, the question then comes to be considered, whether the decree can be right which at once restrains him from printing and selling them to anybody, and compels him to deliver up the blocks and all the stock which he has on hand.

* 221 * The Vice-Chancellor put the case in a manner which struck me forcibly at first, but I confess I cannot quite go along with him. He says that where a person may be making and selling something for a lawful purpose, or may be making and selling it for an unlawful purpose, it will not do for him to say that he is making it to use for a lawful purpose, but he must show in some way or other that it is not to be used for an unlawful purpose. I think I can imagine cases where that reasoning would very properly apply: if, for instance, the article here was one the demand for which perhaps would be of rare occurrence, and there was only one dealer in it in this metropolis, and the defendant was a person who was selling thousands of these labels, in such a case, having reference to the article manufactured, it would be a very fair observation to say that as there could be but one person who could lawfully give an order for the labels it could not be imagined that the defendant's purpose was lawful, and then the Court might interfere. If, however, there are dispersed over the country a hundred, or five hundred, or a thousand persons, for whom these labels might be legitimately made, I cannot think it reasonable to say that the defendant's stock shall be destroyed and his trade stopped, because he may sell to some person to whom he has no right to sell, there being a large number of persons to whom he may legitimately sell. But it is said that this is mere imagination, that persons do not buy labels here, but get all the labels for the *eau-de-cologne* from the manufactory. That is, indeed, rather insinuated than stated, but it appears to me to be a question of fact that must be investigated in the particular case, because if the truth be as is suggested, that these labels are sold very extensively to persons to whom they are legitimately sold, I cannot think it is any subject of complaint, that the defendant sells them to per-

sons without * further inquiry on the subject. The case * 222 of the country bankers' notes appears to me to illustrate what would be the extreme on the other side, for it can hardly be imagined that for any legitimate purpose anybody but the bankers would want them, and the inference would be perhaps irresistible, that a person selling an article of that sort could not be selling it for lawful purposes. I have alluded to this because it was an illustration adopted by the Vice-Chancellor. What, however, appears to me to be really in dispute in this case is the fact whether or not it is true that there are a great number of persons who may legitimately purchase and do ordinarily legitimately purchase the labels in question, because, if there are, I confess that then I cannot concur in the decree which has been made by the Vice-Chancellor. Once arrive at the point that the use of this label is an infringement of the plaintiff's right, and I quite agree with what the Vice-Chancellor has laid down, for this Court would stop anybody from selling an article which should enable the perpetration of that fraud, just as it would stop the use of the label itself; but the Vice-Chancellor has, as it appears to me, taken a course which, though it will stop the fraudulent use, may also stop the legitimate use of the label.

What, therefore, I propose to do is this: I shall dissolve the injunction and order the bill to be retained for a twelvemonth, with liberty to the plaintiff to bring any action which he may be advised. The action will necessarily raise the whole case; but until such an action has been tried, I do not think the case is ripe for decision in this Court.

1854. December 21. 1855. January 12. Before the LORDS JUSTICES.

Publishers agreed with an author to print, reprint, and publish a work by him at their own risk, on the terms of dividing equally with him any profits that there might be after payment of all expenses; and that if all the copies should be sold, and another edition should be required, the author should make all necessary alterations and additions, and the publishers should print and publish a second and subsequent editions on the same terms. After the publication of the first edition the firm of the publishers was changed, and the interest of the old

firm in the work was expressed to be assigned to the new firm. The author prepared and the new firm published a second edition without any new agreement being entered into. Afterwards, a partner in the new firm (the only remaining member of the old firm) became bankrupt, and his assignees, with the solvent partner, sold and assigned to other law publishers all the interest of the firm in the work and all the unsold copies: *Held*, that the purchasers had no share in the copyright of the work, and were not entitled to an injunction to restrain the publication of a third edition by another publisher with the author's concurrence, the agreement being held to be of a personal nature on both sides, and the benefit of it not assignable by either party without the others' consent.¹

THIS was an appeal from the decision of Vice-Chancellor Wood refusing a motion for an injunction to restrain the publication by the defendant William Granger Benning of a third edition of "Forsyth on the Law of Composition with Creditors."

By an agreement dated the 4th of December, 1840, made between Mr. Forsyth, the author of the work, of the one part, and Robert Saunders and William Benning, publishers, of the other part, Mr. Forsyth agreed with the said Robert Saunders and William Benning that the said Robert Saunders and William Benning should print, reprint, and publish the work on the following conditions, to which they also agreed: That the said William Forsyth should fully prepare the whole of the said book for the press on or before the first day of June, 1841, and that he would correct the proof-sheets and superintend the printing thereof. 2d. That the said Robert Saunders and William Benning should direct the mode of printing the said book, and should bear and pay all the charges thereof and of publishing the same (except as hereinafter * 224 mentioned), and should take all the risk * of the publication on themselves. 3d. That the said Robert Saunders and William Benning should, out of the produce of the sale of the said book, in the first instance, be refunded all the costs and expenses which they should have incurred respecting the said book, after which the profits should be equally divided between the said William Forsyth and the said Robert Saunders and William Benning. 4th. That the accounts should be made up at the end of every year, and the profits, if any, be then divided. 5th. That the said Robert Saunders and William Benning should account for all the copies which they should sell of the said book at the wholesale

¹ See 1 Lindley Partn. (Eng. ed. 1860) 402-405; Collyer Partn. (5th Am. ed.) § 613 *et seq.*

booksellers' price, deducting therefrom a commission of 7*l.* 10*s.*, they taking the risk of all credit which they should give on the same. 6th. That all alterations and corrections in the proof-sheets and revises, which should exceed the charge of eight shillings per sheet, should be borne and paid by the said William Forsyth, and should be deducted out of his share of the profits. 7th. That in case all the copies of the said books should have been sold off, and a second or any subsequent edition of the said book be required by the public, the said William Forsyth should make all necessary alterations and additions thereto, and the said Robert Saunders and William Benning should print and publish the said second and every subsequent edition of the said book on the above conditions. 8th. That in case all the copies of any edition of the said work should not be sold off within five years after the time of publication the said Robert Saunders and William Benning should be at full liberty to dispose of the remaining copies so unsold either by public auction or private sale, or in such manner as they might deem most advisable, so that the account might be finally settled and closed.

In 1841 the first edition of the work was published.

* Afterwards the partnership between Robert Saunders and William Benning was dissolved by the retirement of the former, and a new partnership was formed between William Benning and John Kirton Gilliat under the firm of "William Benning & Co.," whereupon the interest of the former firm in the work in question (among others) was expressed to be transferred to and vested in the new firm. * 225

In 1849 Mr. Forsyth prepared a second edition of the work, which was printed and published by the firm of William Benning & Co. without any fresh agreement having been entered into.

In 1851 the partnership of William Benning & Co. was dissolved by the bankruptcy of William Benning.

By an indenture dated the 17th July, 1852, Mr. Gilliat, in consideration of 6500*l.*, assigned to the plaintiffs, Messrs. Stevens and Norton, law publishers, all Mr. Gilliat's interest in the copyright or shares of copyright, of the works specified in a schedule to the deed (which comprised Mr. Forsyth's work) with the MSS. and unsold copies of the several works then in the possession of Mr. Gilliat, and all things pertaining to the copyright and shares of copyright, of which the late firm of William Benning & Co. were

possessed of, or interested in, and over which Mr. Gilliat had any power of disposition, but so far only as Mr. Gilliat could lawfully grant the same.

On the 16th of August, 1854, a further deed of assignment was executed by Mr. Gilliat and the assignees of Mr. Benning, whereby they assigned to the plaintiffs all the copyright, parts or shares of copyright, agreements, and other rights and privileges in
 * 226 any publications, and * all agreements with any authors, editors, or proprietors of books and publications of or to which the late firm of William Benning & Co. were, at the time of the bankruptcy of Mr. Benning, possessed, entitled, or in any manner interested.

Pursuant to these deeds all the stock in trade of the firm of William Benning & Co. was delivered to the plaintiffs, including the unsold copies of the second edition of "Forsyth on Composition with Creditors," of which the plaintiffs had still 400 on hand.

In 1854, the defendant William Granger Benning, a son of Mr. William Benning, published a third edition of the work edited by Mr. Forsyth, whereupon the present suit was instituted, and the motion for an injunction made, from the refusal of which the present appeal was brought. The case is reported below in the first volume of Messrs. Kay and Johnson's Reports. (a)

Mr. Rolt, Mr. J. T. Humphrey, and Mr. Cairns, for the appellants. — First, the agreement in this case is in substance an assignment of the copyright. By it one who has an exclusive right to print a work gives to others the right of printing and reprinting it. That is an assignment of a copyright. It is not necessary that the word "copyright" should be used, and in fact that term is not employed at all in the Act 8 Anne, c. 19, which first created the right. The words of the statute are the "sole liberty of printing."

Secondly, if the Court should not think that the copyright
 * 227 was assigned, then the agreement was one for a * partnership, which determined on the bankruptcy of one of the partners. His assignees and one of the solvent partners assigned their interest in the partnership property, as upon a dissolution they had a right to do. The remaining partner could not be per-

(a) Page 168.

mitted to appropriate to himself or destroy the partnership property.

[THE LORD JUSTICE KNIGHT BRUCE. — But the bill does not ask for the appointment of a receiver, nor does the notice of motion state that application will be made for one.]

That might have been the correct course if the sales of the new edition had been a proper exercise of the powers of one of the partners in the late partnership. But it was altogether an improper proceeding.

Lastly, we submit that, even if neither of these views could be supported, and the contract ought to be regarded as the Vice-Chancellor has considered it, in the light of one of agency, still the agents here had contracted to take all the risk of loss upon themselves, and the principal could not, after entering into such an agreement, bring out an edition in competition with that which was the subject of such an agreement. If he could, the booksellers might have incurred all the expense, and within a week lose all the benefit.

[THE LORD JUSTICE KNIGHT BRUCE. — Would you permit one of your servants to assign his place ?]

If he had paid me for it, I could not give his profits to another. But the cases, we submit, are not at all analogous.

[THE LORD JUSTICE KNIGHT BRUCE. — Suppose the agreement had been assigned to a music publisher ?]

That might have afforded possibly an equity, but in this case the purchasers of the benefit of the agreement are as competent to execute their part as the original publishers were, when it was entered into, and no complaint is or could be made of them.

[THE LORD JUSTICE TURNER. — What remedy would Mr. Forsyth have against Messrs. * Stevens and Norton if they * 228 would not publish a new edition according to the agreement ?]

Such a refusal might also possibly give an equity, but no such case has arisen.

They referred to *Millar v. Taylor*, (a) *Power v. Walker*, (b) *Power v. Walker*, (c) *Donaldson v. Beckett*, (d) *Morris v. Coleman*, (e) *Rundell v. Murray*, (g) *Sweet v. Cator*, (h) *Lumley v. Wagner*. (i)

Their Lordships took time to consider whether they would call upon *Mr. W. M. James*, *Mr. Piggott*, and *Mr. Hindmarch*, who appeared for the respondents.

1855. January 12.

THE LORD JUSTICE KNIGHT BRUCE. — This application was one by way of appeal from the refusal of a motion made by the plaintiffs before the Vice-Chancellor WOOD for an injunction. It was an injunction alone, not a receiver, that he and ourselves were asked to grant. Indeed, a receiver is not prayed by the bill, and the motions were interlocutory merely.

In acceding as I do to the propriety of the course taken by the Vice-Chancellor, I consider it as perfectly consistent with the notion that the plaintiffs may have some ground of claim under the agreement of December, 1840, on which their bill is founded, — may be entitled to have an account or to maintain an action or actions against one or both of the defendants. The only question,

I repeat, with which we are dealing is one of granting or *229 not granting *an interlocutory injunction; and for that purpose it must be observed that such interest, if any, in the copyright of Mr. Forsyth's work on "Composition with Creditors," as the other parties to the agreement acquired under it, they acquired, I apprehend, not exclusively of Mr. Forsyth, but by way of joint adventure with him or of partnership with him, in respect and for the objects of which he undertook the fulfilment, by himself personally, of certain duties to them, and they undertook the fulfilment by themselves personally of certain duties to him; nor, on either side, without the consent of the other, could

(a) 4 Burr. 2303.

(b) 4 Campb. 8.

(c) 3 Mau. & S. 7.

(d) 2 Bro. P. C. 129.

(e) 18 Ves. 437.

(g) Jacob, 311.

(h) 11 Sim. 572.

(i) 1 De G., M. & G. 604.

there be a vicarious performance, a performance by deputy or by assignee, of the duties thus undertaken. At least, so I understand the instrument and the matter; nor do I see that the duties were on either side of such a nature as that their performance specifically could have been enforced by a Court of Equity. My impression, therefore, is, that, had Messrs. Saunders and Benning, parties to the agreement of 1840, retained their original position and rights under it, they could not successfully have asked an injunction against Mr. Forsyth, such as that prayed by the bill before us.

If this opinion is correct, the present plaintiffs clearly cannot do so, but if incorrect, it does not of necessity follow that such an injunction ought to be granted to them. For in them, however trustworthy, Mr. Forsyth has not agreed or intended to place confidence; with them, however respectable, he has not consented to associate himself. In the way of specific performance, there must be at least as much difficulty between him and them as between him and the other parties to the agreement of 1840.

I do not assert that the plaintiffs have not, or that they have, been wronged. If wronged, they may proceed for * damages or compensation, or an account, but any such * 230 injunction as that now sought seems to me plainly impossible. The appeal, not supported in my judgment by *Morris v. Colman* (a) or *Lumley v. Wagner*, (b) (cases which I do not question) appears to me opposed by a great body of binding authority, as well as by principle, and one of course to be dismissed with costs.

THE LORD JUSTICE TURNER. — The question in this case arises upon a motion for an injunction to restrain the publication of a book. The plaintiffs' case was rested wholly on the agreement of the 4th of December, 1840. [His Lordship read it.]

Three points were raised in argument. First, that the agreement amounted to a valid assignment of the copyright of the work. Secondly, that if it did not amount to an assignment, it constituted a partnership between Mr. Forsyth and Messrs. Saunders and Benning in the copyright, and that the plaintiffs are the assigns of the interest of Messrs. Saunders and Benning. Thirdly, it was said, that if it were neither an assignment nor a partner-

(a) 18 Ves. 437.

(b) 1 De G., M. & G. 604.

ship, still there was a personal equity against Mr. Forsyth which would operate against the other defendant claiming under him, to protect the unsold copies of the second edition of the book in question.

It is clear, on looking at the agreement, that it does not amount to an assignment of the copyright. All its provisions have reference to the printing and publishing the work, and to the mode of paying the expenses to be incurred. Clauses 1 and 2 of the agreement provide that Mr. Forsyth shall prepare the book for the press, and correct the proof-sheets, and that Messrs. Saunders and Benning shall direct the printing and publishing and bear all

* 231 the charges and expenses. The end of the * second clause, and the four succeeding clauses, relate to the expenses and the mode of sale. The seventh clause relates to the conditions upon which a second and subsequent editions of the work are to be published, and these conditions refer back again to the mode of printing and publishing, and the mode in which the expenses are to be paid. The eighth clause provides for the closing of the account in a particular event. That clause shows that the agreement was not intended to operate as an assignment of the copyright, as it merely contains a provision for closing the account between them in respect of the interest in the copies of the work, and making no reference to the copyright. I think, therefore, that the agreement is not an assignment of the copyright.

Next, if there was a partnership, then, if the agreement does not affect the copyright, the partnership was not in the copyright, but in the copies printed under the license contained in the agreement. In that case the court has nothing to do with the question of partnership, except as regards the unsold copies.

It was, however, said that there was a personal equity against Mr. Forsyth operating in this mode; that Mr. Forsyth could not, as between him and Messrs. Saunders and Benning, have permitted a third edition of the work to be issued whilst copies of the second remained unsold under the agreement. How the case would have stood if Messrs. Saunders and Benning had remained in a position to perform their part of the agreement, I need not give any opinion, but if there was a personal equity on one side, there must also be one on the other. If Messrs. Saunders and Benning are not in a situation to perform their personal part of the contract, neither in my view of the case could they in equity

enforce as against Mr. Forsyth any contract which he had entered into with * them, and I think that the plaintiffs, * 232 who are the assigns of Messrs. Saunders and Benning, can be in no better position than Messrs. Saunders and Benning.

It is quite clear that the view taken by the Vice-Chancellor is the correct view of the case, and that the appeal motion must be dismissed with costs. The costs of the proceedings before the Vice-Chancellor will be costs in the cause.

HART v. CLARKE.¹

1854. December 12, 13, 21. Before the LORDS JUSTICES.

An adventurer in a mining company, the rules of which did not contain any provision for the forfeiture of shares on non-payment of calls, received notice from his co-adventurers and co-lessees of the mines, that unless his arrears of calls were paid up, his shares would be forfeited on a specified day. He replied by denying the right to forfeit his shares. A resolution extending the time for payment was then communicated to him, to which he replied by denying the right to deprive him of his share in the lease. Some months after the extended time had expired, he received from the co-adventurers another application for payment of his arrears, of which he took no notice until more than six months had elapsed, when he claimed to be still a partner. Two years afterwards he filed a bill for an account: *Held*, that he was entitled to be still considered a partner.²

Although mining partnerships differ in many respects from others, and it would be often unjust to allow a partner to participate in the success of such a speculation who had omitted to contribute to it while doubtful, it would be scarcely less unjust to allow, in all cases, the partners who have paid, as against one who has not, to take the law into their own hands and appropriate to themselves the whole profits.

Every such case depends on its own circumstances, and particularly on the question whether there has been a purpose of abandonment on the part of the partner in default.

THIS was an appeal of the plaintiff from a decree of the Master of the Rolls, declaring that a joint adventure between the plaintiff

¹ S. C., 6 H. L. Cas. 633, affirming the case here reported and reversing S. C. 19 Beav. 349.

² See 2 Lindley Partn. (Eng. ed. 1860), 616, 617, 621, 762-769; Clements v. Hall, 2 De G. & J. 173; 24 Beav. 333; Clarke v. Hart, 6 H. L. Cas. 633.

and defendants, called "The Goldscope Mining Company," was concluded, so far as the plaintiff was concerned, on the 31st of May, 1850, and directing an account to be taken of what was due to and from the plaintiff on that day for the value of his interest in the moneys, machinery, stock, mines, and property of the adventure; and if it should appear that any balance was due to the plaintiff, then that an account should be taken of the subsequent profits (if any) of the adventure, and declaring that in

* 233 such case the plaintiff * was entitled to so much of such profits of the adventure as had been occasioned by or were attributable to that balance, as forming a portion of the capital of the said adventure, or to interest on such balance at the rate of 4l. per cent per annum at the option of the plaintiff. The hearing below is reported in the 19th volume of Mr. Beavan's Reports, p. 349. The material facts of the case, as regards the decision upon the appeal, were in substance the following, as stated in the judgment of the Lord Justice TURNER.

The adventure in question originated in an agreement, dated the 14th of November, 1848, whereby, in consideration of 1100l. to be paid by the plaintiff to one William Clemence, William Clemence sold to the plaintiff all his interest in "the Goldscope Mines," in the parish of Crosthwaite, in Cumberland, with all other lodes or mineral veins found within a sett made to William Clemence by General Wyndham, lord of the manor of Crosthwaite, with the buildings, tramways, machinery, tools, and appurtenances. This agreement was entered into by the plaintiff in pursuance of an arrangement which had previously been made between him, George William Horn, and the defendants Andrew Richard Clarke and Charles Nicholas Patrick Chapman.

On the 16th of November, 1848, a meeting took place between the plaintiff and defendants and George William Horn, at which they determined to adopt the agreement; and resolutions were passed to the following effect: that the agreement should be adopted; that the mines should be worked on the cost-book system, as recognized in Cornwall, or such other system as the directors thereafter named should deem more expedient; that meetings should be held monthly, and three proprietors do form a quorum; that the society should be called the Goldscope

* 234 * Mining Company, and that the sum of 1500l. should be raised in six shares of 250l. each, payable by instalments,

the said number of shares being agreed to be held as thereafter mentioned (that was to say), Mr. Andrew Richard Clarke two shares, Mr. Charles Nicholas Patrick Chapman two shares, Mr. George William Horn one share, and Mr. Thomas Hart one share; that an instalment of 50*l.* per share should be then made payable at Messrs. Willis, Percival, & Co., to the credit of the Goldscope Mining Company; that all checks on behalf of the company should be drawn at a meeting of the committee, and signed by two of the directors present; that the plaintiff should be appointed manager, to act gratuitously under the direction of the committee until the funds should exhibit an actual profit to the company of 1,000*l.* from which time the plaintiff's services were to be paid for at the rate of 100*l.* per annum.

On the 12th of January, 1849, Mr. George William Horn having signified his intention to withdraw from the company, it was resolved that the one-sixth share in the Goldscope Mining Company, late in his possession, should be taken by Messrs. Clarke, Chapman, and Hart, in the proportion of one-third part to each proprietor.

These resolutions were entered in the cost-book of the company by the plaintiff, and at the foot of the entries was the following memorandum, signed by the plaintiff and defendants: "6th March, 1849. We, the undersigned, hereby engage to fulfil the conditions before recited, but limit our responsibility for payment of costs, as also our claims to advantage, to the extent of the number of shares held by us in the Goldscope Mining Company, according to the principles of the cost-book system as recognized in Cornwall and Devonshire."

* No other articles of partnership were executed.

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After the retirement of Mr. Horn, General Wyndham granted a lease of the mines to the plaintiff and the defendants for the term of twenty-one years from Christmas, 1848. Upon the commencement of the undertaking the plaintiff, in pursuance of the partnership agreement, took upon himself the management of the concern, and he continued to act as manager down to the month of November, 1849. Upwards of 2000*l.* had at this time been expended on the mines, and it appeared that still further expenditure would be required, and that the plaintiff was unable to meet his proportion of it otherwise than by a sale of a portion of his interest in the mines. A scheme appeared to have been about

this time set on foot for disposing of part of the mines in shares, and it advanced so far that the plaintiff agreed to sell a considerable number of the shares to which he would have been entitled under the scheme, with a view to meet his share of the expenses of the mines; but before this scheme was carried into effect, the defendants raised objections to it, and it ultimately fell to the ground.

A correspondence took place, of which the following were the material parts: —

Clarke to Hart, 26th November, 1849.

“I regret exceedingly you cannot obtain a customer for at least some of your shares, and although I cannot hold out any hopes to you, you still have my best wishes of success. It is most unfortunate, as it places both Mr. Chapman and myself in a painful and most unpleasant position. You are well aware of the demands here, and that those demands must be met, although they are great losses. It is, I assure you, a difficulty on my part to spare so large an amount out of my business, particularly
 * 236 * at this season of the year. I therefore urge you most seriously to obtain your share.”

Hart to Clarke, 27th November, 1849.

“I am sorry to say I have not yet succeeded in finding a purchaser for any of my shares, but I am still in negotiation to effect a sale, and will endeavour again to see the party from whom I hope to get cash for Friday, as I care less about the loss of money than I do in being in the state I am. You may be quite sure I will leave nothing untried which will assist me in my present dilemma; it is not what ‘I ought to do,’ but it is ‘what can I do,’ — there is no use in mincing the matter. If I can get the money, you shall have it, if I am obliged to sacrifice a couple of hundred pounds to get it. But, supposing, with all my exertions, I cannot get it, what then? I am quite as much disposed to meet my claims as you are; but if I cannot immediately find the means, how can I do so?”

“I hope you will soon be in London again, that something may be definitely arranged respecting my position in the company. If I cannot pay my calls, my shares in Goldscope will be adverted to in our next meeting, and when notice has been given of the intention of the company, they will be forfeited unless the money be

paid. This is the usual mode of proceeding, and which I shall endeavour to avoid."

Chapman to Hart, 26th March, 1850.

"My dear Sir, — Mr. Clarke, together with myself, is still much annoyed that you have not ere this made some arrangement for the payment of your arrears of calls, leaving to us the responsibility of working the property with our own advances, whilst, in consideration for such advances, during your alleged inability to pay, there has * not emanated from yourself an offer of a moiety * 237 of your shares as an acknowledgment or equivalent for the cost. With all good feeling, my dear Sir, to yourself, we are bound to treat this adventure in a purely business manner, and, whilst we regret your unfortunate position in the concern, yet for the risk incurred, and the outlay expended, we do feel that for you to come in and enjoy a profit resulting from our exertions, in the face of an unpaid debt, is not what either of us would exact or expect were we so similarly circumstanced. I therefore, with my friend's consent, thus allude to what at least appears to us the more equitable act, of your handing over a moiety of your shares until such time when you can discharge the claim and put yourself on your old footing with us; a proceeding that would greatly tend to restore that confidence and unanimity enjoyed at the outset of our enterprise."

Hart to Chapman, 27th March, 1850.

"Your request to have the moiety of my shares is not reasonable in my opinion, and I will venture to say is unprecedented; consequently, this I cannot accede to. If I am to consider this as a purely business affair, what must my thoughts be when I find a considerable sum of money which I have already expended for profit kept in abeyance, while Mr. Clarke is catching, probably, at the shadow, and losing, for certain, the substance? I have already pointed out the course which should be pursued, and by which perhaps not only should we get back our capital, but reap a most advantageous profit."

Chapman to Hart, 3d April, 1850.

"Sir, — I am instructed to inform you that a call of 12*l.* per share has this day been made upon the shares of the Goldscope

Mining Company, and to request that such call (amounting * 238 to 16*l.* upon your shares), as well as all * arrears due at this date, be paid to the credit of the company at their bankers immediately. I am also desired to give you notice, that unless the above call and your arrears are paid on or before the 30th instant, your shares will be declared forfeited in accordance with the company's agreement."

On the other side of the sheet containing the last letter was the following:—

Chapman to Hart, 3d April, 1850.

"My dear Sir,—In handing you, on the other side, a notice for a further call, to enable us to prosecute our mining operations, I cannot omit the opportunity of expressing the regret of Mr. Clarke and myself at your total rejection of our proposition of the 26th ultimo, which was made on our parts in the true spirit of equity, honour, and justice. For myself, I can only assert that, though the disappointment and large expenditure are in themselves matters of extreme vexation, yet they are comparatively little compared with the annoyance of finding the *onus* of the adventure thrown upon its support in an unfair proportion, whilst the very party who conducted the management up to last November, when the main part of the cost was made, now, in the face of large arrears, infers want of capability to our management and refusing to yield any compensation for our advances. I can conclude only with wishing you will make some speedy settlement of this unpleasant business."

Hart to Chapman, 5th April, 1850.

"My dear Sir,—I beg to acknowledge the receipt of your favour of the 3d instant, and shall be glad to know when I can see the cost-book and cost sheets from last October."

* 239 * Hart to Chapman, 8th April, 1850.

"My dear Sir,—I shall be obliged by your informing me when I could see the cost-book and cost sheets from October last, as Mr. Clarke has consulted Mr. Bragg upon the subject of our engagements. You must know, or ought to know, you can only dissolve our partnership with my consent, and that you possess no power to forfeit my shares, of which you are desired to 'give me

notice, unless,' &c.; consequently, this but little affects me. You object to be associated with shareholders whom you don't know, and thus put difficulties in the way of converting my property into cash that I might pay you, and then threaten me with the forfeiture of my shares if I did not; perhaps this may be called equity. You will not buy the property yourselves, and prevent my selling it to others; this, perhaps, is justice. You keep the expenditure a secret (part of which I am requested to pay). You take possession of the ores raised, of which no account is given. You make discoveries of lead in Yewthwaite, and leave it standing until my shares are, as you believe, forfeited, although, for aught you or I know, there may be sufficient to pay all claims upon me; this you call honour."

Chapman to Hart, 2d May, 1850.

"Dear Sir, — Finding that your arrears of calls due to the Goldscope Mining Company have not been paid at this date, the company have determined on convening a meeting at this office to-morrow evening, at half past five, P.M., for the purpose of forfeiting your shares in the property, in pursuance of their notice to you of the 3d ultimo."

Hart to Chapman, 3d May, 1850.

"I have to acknowledge yours of yesterday's date. As I do not intend to assign any part of our joint leasehold * prop- * 240 erty in Cumberland without I get paid for it, nor to part with it in any other way unless I get an equivalent value according to my estimate of its worth, I beg to state you are committing another act of folly by the course you are pursuing, and feel confident you will regret having done so, should I be provoked by a continuance of this absurdity. I have before told you, and repeat it, you have no power to deprive me of my share of the leasehold property we possess. I have hitherto shown forbearance towards you, in consequence of the unfair proportion of money you have been obliged to pay on my account; however, you will recollect I had once an opportunity to sell your share, as also my own, in this adventure, and that after we had seen the effect of working in Goldscope; this you rejected, and thus was I deprived by yourself of the chance (for the first time) of liquidating all claims on me in this undertaking.

“ After three times destroying my chance of paying every fraction due to you, you now think you can take my share from me by force. Is this the course of justice, honour, or equity of which you boasted ? I shall be glad to have the results of this evening’s meeting ; but I advise you to be cautious how you attempt to commit an act, the publication of your names attached to which may bring discredit and disgrace upon yourselves.”

Chapman to Hart, 4th May, 1850.

“ Dear Sir, — Your letter of yesterday’s date was duly received and submitted to the meeting of the company last evening, when a resolution was adopted, of which I beg to hand you a copy on the other side. I am also instructed to express a hope that you will be able to settle the matter by the 15th instant, and not cause your shares to be then and there forfeited.

* 241 * “ ‘ Extract from the Minutes of a Meeting of the Goldscope Mining Company, held at Euston Square, 3d May, 1850.

“ ‘ Read letter from Mr. Hart of this date, in reply to a notice given him for the forfeiture of his shares.

“ ‘ Resolved, that whilst deprecating the tone assumed by Mr. Hart, yet, in consideration of the amount he has already expended in the adventure, the company grant an extension of time, with the view of further endeavouring to facilitate the payment of his arrears, or of his making some satisfactory settlement with the company, such extended period to cease on Wednesday the 15th instant.’ ”

Hart to Chapman, 6th May, 1850.

“ My dear Sir, — Yours of the 4th inst. is now before me. I take occasion once again to tell you I think the only probable chance you have of getting from me certain sums of money, which you claim, is by the sale of my proportion of the property I have the misfortune to possess in conjunction with yourself and Mr. Clarke. This I have offered you at a sacrifice of 200*l.*, which you have declined. Finding you would neither purchase it yourselves, nor suffer me to sell it to others, that I might pay your claims (so far as they were just), I offered to submit our differences to arbitration, and abide the decision of the arbitrators.

This also you rejected, preferring — a somewhat anomalous idea — I should give you what I do not possess, or borrow from a friend, to give you, a sum of money I might never have the power to return. As it is rather difficult to do an impossibility, the first proposition I shall not attempt to accomplish; and as the borrowing of money, to get out of debt, is not in accordance with my opinion of an Englishman's method of liquidating a claim, I shall decline it. If a loss is to be * sustained, let such * 242 loss fall on those through whose imprudence these losses are sustained. I shall lose 500*l.* and you 3000*l.*, for be assured you must either buy my interest, and thus take legitimate possession of the whole property, or dispose of the mines in the way I have indicated, or lose the money which has been risked in this undertaking. The first plan, to me, would be most agreeable, as I should thereby get rid of this vexatious annoyance; the second would be most conducive to my profit and your own; but, should you adopt the third course, the fault will be entirely yours, and therefore (as is but just) you will have to bear the heaviest loss. My 500*l.*, left as it is to the tender mercies of the great proprietors, I consider in a most pitiable plight; but, should I thus lose it, I have the (negative) consolation of knowing I have companions in my misfortunes, and this will be the only solace left me in closing my account with the Goldscope Mining Company. But should you, after all (as is my opinion), take the wiser course, and endeavour to dispose of the mines in shares or otherwise, the entire moneys raised from the sale of my proportion of the property should pass into your hands, until the whole of the claims on me (with interest) be paid you; furthermore I promise to use my best exertions to sell your shares (after my own are disposed of), you allowing me, for so doing, twenty-five per cent on all sales so effected by me or by my means, directly or indirectly. If you think you can do better than this by your 'resolutions' (you know mine), attempt it, and take the consequence to yourselves. At the same time, I am bound to tell you, as you are inclined for peace or war, so you will find your most obedient servant, THOMAS HART."

Chapman to Hart, 26th August, 1850.

"My dear Sir, — Ever since I wrote you on the 4th May last, relative to your position in the Goldscope * Mining * 243

Company, both Mr. Clarke and myself have been very desirous to afford ample time for you to make arrangements for the settlement of your debt to the company; and as we have, in our opinion, afforded you every opportunity, we must press the matter more particularly to your notice, and request an immediate payment of your liability. Every day is increasing your proportion of cost in the adventure, which we think you should be apprised of, and not let the affair so continue without some notice. You will, perhaps, recollect that, at one of our meetings in the early part of this year, an offer was made you to give us a release of your share, and, in the event of the adventure being successful, we should not forget yourself in the division of profits, which then appeared far more probable than at this present time, when the appearance of the mines looks worse than ever. The proposition you rejected; and so we have proceeded on in the old way, paying out of our own pockets the cost that should be met by all the adventurers *pro rata*. We trust, therefore, you will be able to make us some proposition, whereby the affair may be settled, and the irksomeness of all our positions be removed. Mr. Clarke, who is at the mines, promised to send you a statement of your debt. Has he done so? for, if not, I will urge him, when next I write, to do it at once."

No answer appeared to have been sent to this letter, and no further correspondence took place till the 15th of April, 1851, when Mr. Hart wrote to the defendants as follows:—

"Gentlemen,—It was with much pleasure I heard of our success in the Yewthwaite Mine, the detailed particulars of which I shall be obliged by your forwarding to me at your earliest convenience, together with the amount of costs incurred in this mine since my last payment, as also the returns for ores sold."

* 244 * No reply was sent to this letter, and, on the 31st of October, 1851, Mr. Hart again wrote to the defendants as follows:—

"Gentlemen,—I did myself the pleasure to address you on the 15th April last, requesting the particulars of your proceedings in our joint undertaking in Cumberland. Not having been favoured

with an answer, I have now to state, if I do not receive a reply to this, I shall take the earliest opportunity, suitable with my convenience, to visit the mines, and thus ascertain the state of affairs there, the expense of which journey (on the settlement of our accounts) will necessarily be in part paid by yourselves. As I think it likely, at this time, something might be done with those parts of our property which have for so long a time been in abeyance, I shall be glad to know whether it is yet your intention to endeavour to recover the money we formerly so unprofitably expended, by disposing, in some way, of this part of our land. At this time, I think it might be for our advantage if a meeting, for the purpose of business, could take place between us in London; but, unless there be an uniform inclination to turn to account the interests we possess in common, so far as the mines are concerned, we may be spared the trouble of meeting, and the information I require from you may be communicated by letter."

The following correspondence then took place: —

Clarke to Hart, 1st November, 1851.

"In answer to your letter of the 31st ultimo, I beg to refer you to Mr. Chapman's letter of the 4th of May, 1850, and also to call your attention to one of yours, addressed to me on the 27th November, 1849. Provided you consider yourself entitled to any further information, all I can say is, the law is open to you, and the sooner you prove it the better."

* Hart to Clarke, 10th November, 1851.

* 245

"Sir, — Yours, from Keswick, of the 1st instant, posted from Plymouth, I received a few days since. When I wrote you last, it was in the hope that, by this time, you would have seen the folly of the course you have taken; however, as it appears otherwise, so let it be. We shall all be out of pocket until success (if, &c.) shall enable us to repay all that has been expended in this unfortunate speculation. Should brighter days come, and you should resist the payment of my proper proportion of the interest I hold in this property, I shall take advantage of the kind advice you have so gratuitously given, and let the law render me that justice you appear to be so little acquainted with; but I shall not be disposed to consult the Lord Chancellor until our mine or mines

yield sufficient to pay law charges: thus, you will observe, you will remain in peaceful possession of your wrong-doing until I find your intention to defraud me of my right is manifest by the fact, and then, if not before, you shall hear of your most obedient, THOMAS HART."

No further communication took place between the parties till the 23d of April, 1853, when Mr. Hart's solicitor wrote to the defendants as follows:—

"Gentlemen,—I have been consulted by Mr. Hart with reference to his interest in the Goldscope and other mines, purchased by him in conjunction with yourselves, and am directed to apply to you for an account of costs and expenses incurred in working the mines, as also an account of the proceeds of the ores raised from them, from November, 1849, to the present time. I will also thank you to inform me when it will be convenient for you to produce the books relating to the mines, for the examination of myself or agent."

* 246 * Further correspondence ensued, which continued to the month of July, 1853. In the month of August, 1853, the bill was filed. It contained the following paragraph:—

"The defendants allege that the plaintiff had not paid certain calls made by the company on his shares therein, and that, by reason thereof, the defendants had the right and power to declare his said shares to be forfeited; and that, accordingly, at a meeting alleged by the defendants to have been held on the 31st day of May, 1850, at which the defendants were alone present, and in the absence of the plaintiff, they declared the plaintiff's said shares to be forfeited; and they allege that, thereupon, he ceased to have any share or interest in the said partnership, or in its property and effects. Whereas the plaintiff charges that, even if he were in arrear of any calls duly made, which he by no means admits, the defendants had no right or power to forfeit his shares in the said company, for by the cost-book system, as recognized in Cornwall, a company, carried on on such system, have no right or power to forfeit shares for non-payment of calls unless there is a special provision to enable them to do so written and entered in

the cost-book or deed of settlement of such company, and there is no such provision written or entered in the said cost-book of the said Goldscope Mining Company, or in any deed of settlement thereof; and, moreover, the plaintiff charges that no resolution was ever duly passed by the said Goldscope Mining Company, declaring his shares to be forfeited, and that no such resolution was even ever passed by the defendants themselves, either on the said 31st day of May, 1850, or at any other time, and no minute of any meeting of the said company on that day, or of any such resolution passed on that day, is entered in the said cost-book or in the minute-book of the said * company; and the * 247 plaintiff further charges that long after the said 31st day of May, 1850, the day on which the defendants pretend they declared the plaintiff's shares to be forfeited, the defendants treated the plaintiff as being still a partner in the said company, and on the 26th day of August, 1850, the defendant Charles Nicholas Patrick Chapman wrote and sent a letter to the plaintiff, in which he stated to the plaintiff as follows: 'Every day is increasing your proportion of costs in the adventure,' and by the words 'the said adventure,' the said Charles Patrick Chapman meant the said Goldscope Mining Company."

The defendants by their answers denied these allegations, and insisted upon the forfeiture, and evidence was entered into on both sides, as to there being or not being a custom in mines, worked on the cost-book system, as recognized in Cornwall, to forfeit the interest of shareholders in the mines for non-payment of calls.

The cause was heard before the Master of the Rolls on the 9th of June, 1854, and his Honor was of opinion that the alleged custom of forfeiture was not established, but that the declaration of forfeiture by the defendants on the 31st of May, 1850, brought the adventure to a conclusion, so far as the plaintiff was concerned. The grounds of his Honor's decision will be found fully stated in Mr. Beavan's Report above referred to.

From this decision the plaintiff appealed.

Mr. R. Palmer, Mr. Collier, and Mr. W. W. Cooper, in support of the appeal, cited *Fereday v. Wightwick*, (a) *Dale v. Hamilton*, (b) *Clegg v. Fishwick*, (c) and *Collyer on Partnership*. (d)

(a) 1 Russ. & Myl. 45.

(c) 1 Mac. & G. 294.

(b) 2 Phil. 266.

(d) Page 784 (2d ed.).

* 248 * *Mr. Roupell, Mr. Cochrane, and Mr. Tapping*, for the defendant Clarke, and *Mr. Follett and Mr. S. Thompson*, for the defendant Chapman, cited *Norway v. Rowe*, (a) *Prendergast v. Turton*, (b) *Roberts v. Eberhardt*, (c) *Wedderburn v. Wedderburn*, (d) *Brown v. De Tastet*.(e)

December 21.

THE LORD JUSTICE TURNER. — The plaintiff in this cause, alleging himself to be a partner in a mining concern, has filed this bill to have the partnership dissolved, the accounts taken and the property realized under the direction of the Court. The defendants, the co-adventurers in the mines, by their answers insist that the plaintiff's shares in the mines have been forfeited, and that he has ceased to have any interest in them.

His Lordship then stated the facts of the case, the correspondence and the decree at the Rolls, and proceeded thus: The plaintiff has appealed from this decree. I fully agree with the Master of the Rolls in thinking that the evidence fails to establish the custom of forfeiture on which the defendants have insisted. The right of forfeiture is one *strictissimi juris*, and the evidence to establish such a right ought to be clear and distinct, but the evidence on the part of the defendants upon this point seems to me to be far from satisfactory. The bill alleges that the right to forfeit exists only where there is a special provision for authorizing it entered in the cost-book or deed of settlement. The attention of the defendants, therefore, was distinctly drawn to the point,

* 249 that the right was alleged to depend upon the * agreement contained in the cost-book or deed of settlement, and not upon custom, independent of agreement, but the defendants' witnesses are silent upon this distinction. They state, indeed, that it is a principle and usage of the cost-book system, as recognized in Cornwall and Devon, that the companies have power to declare shares forfeited for non-payment of calls, but this may well be if it be the custom in those counties to insert in the cost-book or deed of settlement a provision authorizing such forfeiture, and

(a) 19 Ves. 144.

(b) 1 Y. & C. C. C. 98; S. C. on app. 13 Law J. (N. S.) Ch. 268.

(c) 1 Kay, 148.

(e) 1 Jacob, 284; 4 Russ. 126.

(d) 4 Myl. & Cr. 41.

none of these witnesses state whether, in the instances deposed to by them, in which forfeitures have been declared, such a provision existed or not. On the other hand, the witnesses on the part of the plaintiff expressly take the distinction between the cases in which the cost-books or deeds of settlement contain provisions authorizing forfeiture, and those in which no such provision is contained, and wholly deny the existence of the right of forfeiture in cases of the latter class, and this evidence is strongly confirmed by what appears to be the practice of the Stannaries Court, in which the course is not to declare the shares of defaulters forfeited, but to sell them and hand back to the defaulters the surplus proceeds, after payment of their calls in arrear.¹

I feel no difficulty, therefore, upon this part of the case, but beyond this I regret to say that I am unable to concur in the judgment of the Master of the Rolls. His Honor has been of opinion that the declaration of the forfeiture worked a determination of the adventure so far as the plaintiff is concerned, and gave the defendants a right to take the plaintiff's interest at its then value, accounting to him for the subsequent profits so far as they may have been derived from the excess of the value above the amount of the calls in arrear. I should have been * glad to have concurred in this conclusion, but I find * 250 myself unable to do so.

This is an adventure in which, as to the material part of the property embarked in it, there was a legal interest vested in the plaintiff. Up to the moment when the alleged declaration of forfeiture was made the plaintiff had beyond all question a joint interest in the adventure, and it is difficult to see how the alleged declaration of forfeiture, which there was no authority to make, could operate to destroy that interest, or to alter or affect it. The decree seems to have proceeded upon the ground that, no time being limited for the duration of the adventure, the defendants had full power to determine it; and that it was determined by the declaration of forfeiture. But the object of that declaration was to determine the adventure, not as to all the adventurers, but as to the plaintiff alone, entitling the defendants to the plaintiff's share; and I do not see how, in the absence of any special provision for the purpose, the defendants could have the right so to determine it.

¹ See 1 Lindley Partn. (Eng. ed. 1860) 112.

Assuming, however, that the declaration of forfeiture worked a determination of the adventure so far only as the plaintiff was concerned, does it follow that the defendants were entitled to take the plaintiff's share at its then value? In ordinary partnerships, dissoluble at will, the dissolution of the partnership must be followed by the winding-up of the concern; no partner is entitled to take to himself the share of another partner, at its then estimated value; and, without going the length of holding that mining adventures are to be considered in all respects as trading partnerships, I certainly am not prepared to hold that there is so great a difference between them as could entitle the defendants so to take

the plaintiff's shares. Special provisions may be, and no
 * 251 doubt generally * are, inserted in agreements for carrying on mining adventures to provide for the event of any of the adventurers making default in payment of their due proportions of the expenses of the concern; but, if there be no such provisions contained in the agreements, I cannot think that the adventurers who have paid up can be entitled to take the law into their own hands as against the defaulters. Resort must, as I think, in such cases be had to a Court of justice to determine what is right to be done between the parties. Possibly the course adopted in the Stannaries Court may be that which in ordinary cases it would be right to pursue, but of course each case would be governed by its own circumstances.

It was said, however, that, whatever might have been the plaintiff's rights if he had come promptly to this Court for relief, he is not now entitled to call for its interference; that, whilst the adventure was doubtful, he permitted the defendants to incur expenditure upon the speculation, and that he has only come forward to assert his title when the adventure was likely to be attended with success. His letter of the 15th of April, 1851, certainly gives color to this charge, and it is upon this part of the case I have felt the greatest difficulty. The Court has leant strongly against conduct of this description, and with great justice.

Adventures of this nature are necessarily speculative, and it is unjust that parties who have refused to bear the burden of the expenditure whilst the speculation is doubtful, should come in and claim the benefit of it when it has turned out to be advantageous; but, on the other hand, it would be scarcely less unjust to lay it down as a general rule that no shareholder in a mine shall

be entitled to relief in equity, when the adventure becomes productive, unless he has paid up his calls whilst the *adventure continued to be unproductive. Persons who * 252 enter into speculations of this description must be taken to have looked to the means of those with whom they embark in the adventure, and to calculate upon the entire burden which may fall upon them if the means of their co-adventurers prove inadequate to meet the expenditure. They have besides, as I think, the right to resort to a Court of justice to determine what is just to be done when their co-adventurers do not supply their due proportions of capital. It does not, therefore, seem to me that it would be right to hold that the adventurers who continue the concern, should in all cases be entitled to appropriate to themselves all the profits of the adventure when it turns out to be advantageous as against those who have failed to make good their contributions.

Each case of this description must, I think, be governed by its own circumstances, and what is mainly to be looked at, as I think, is whether there has been a purpose of abandonment on the part of those who have made default in their contributions. If there has been such a purpose of abandonment, that purpose cannot be recalled when the adventure becomes profitable. If there has not, why are the defaulting parties to be deprived of any benefit which may result to them from the other adventurers being compelled to resort to a Court of justice for relief?

Looking at the present case in this point of view, I have (though not without considerable doubt) arrived at the conclusion that the plaintiff is entitled to relief. He distinctly asserted his title, and gave notice to the defendants that he disputed their right to forfeit his shares before the forfeiture was declared. His title was recognized by the defendant Chapman (under whom the defendant Clarke in part claims) in August, 1850, for, notwithstanding * what is said in the answers, I think that the letter * 253 of that date cannot be regarded otherwise than as a recognition of the plaintiff's title. He again asserted his title in April and October, 1851; and in November, 1851, he reasserted, and in effect gave notice to the defendants that they would proceed at their peril; and, although he made no further assertion of title till April, 1853, and did not file this bill till August in that year,

I think he may fairly be considered to have rested during that interval upon the notices which he had previously given.

I am the more satisfied with the conclusion at which I have arrived, as there is a legal interest in a considerable part, if not the whole of these mines, remaining vested in the plaintiff, and, under the circumstances of this case, I certainly cannot see my way to declare him a trustee of that interest for the defendant Clarke, which, as it seems to me, would be almost the necessary consequence of holding that his beneficial interest in the property had ceased; and I am still more satisfied with the conclusion, because I observe that the plaintiff had paid up more than his full share of the capital originally agreed to be subscribed. It appears, I think, that he had paid somewhere about 400*l.*, the original capital which was agreed to be subscribed being 1500*l.*, his share of which, taking the one-third and the one-sixth of the one-third, would be less than the amount which, by the answer of the defendants in paragraph 16, is stated to have been actually paid by him.

Although, however, I think the plaintiff is entitled to relief, I think that he is not entitled to it to the extent to which it is asked. There is a case of exclusion, and he is therefore entitled to a declaration that the adventure ought to be determined, but the expense of carrying on this mine has fallen upon the defendants,

* 254 and the conduct * of the business has been left to them. I think, therefore, he must submit to their being allowed interest on the excess of their expenditure beyond their due proportion, and must be put upon the terms of not questioning any expenditure *bond fide* made by them in carrying on the mines.

It was urged, on the part of the defendants, that after the declaration of forfeiture they could not have claimed against the plaintiff as a partner, and that he ought not therefore to be permitted so to claim against them, but the answer to this argument is that the defendants are prevented from claiming against the plaintiff only by their own unauthorized act.

Several points were urged on the part of the plaintiff to which I have not thought it necessary to advert, but it may be as well to add that I think this case very clearly distinguishable from *Prendergast v. Turton*, (a) and that nothing which I have said is

(a) 1 Y. & C. C. C. 98, affirmed on appeal.

intended in any way to detract from the authority of that case, in which I fully concur.

Under the circumstances of the case, I think it will be better to reserve the question of sale, and that the proper decree will be, to declare that the adventure ought to be determined; to determine it accordingly; to direct an account of all sums of money paid, laid out, and expended in and about the adventure, and of the sums contributed by the plaintiff and defendants respectively for that purpose; an account also of the produce and profits of the mines received by the plaintiff and defendants respectively; with directions that in taking the accounts the defendants be allowed interest at five per cent on the excess of their expenditure, and the plaintiff be not * allowed to call in question any * 255 expenditure *bonâ fide* made in carrying on the mines; the plaintiff undertaking to pay his due proportion of expenses to be incurred beyond receipts, appoint a receiver and manager to carry on the mines till further order, with liberty to each party to propose himself; reserve the question of sale and further consideration; no cost to the hearing.

THE LORD JUSTICE KNIGHT BRUCE.—Though there are differences between *Prendergast v. Turton* (a) and the present case, — differences favourable, I think, to the present plaintiff, — I am not sure that he has not so acted as to bring him within reach of the principles on which that decision proceeded, so as to render the dismissal of his bill a correct and proper course. I cannot, however, but recollect that he seems, under the grant or sett made by General Wyndham, to have acquired a legal title, which legal title, if acquired, has not, in my opinion, been defeated or affected by any thing that has taken place. It seems to me still available in a Court of Law to the plaintiff, and accordingly, as I view the matter, if he were to bring an action against the defendant Mr. Clarke, or against both the defendants, founded on that grant or sett, and their disturbance or ouster of the plaintiff, as one of the grantees named in it, the action would be successful, and execution in it could not properly be restrained at law or in another suit here on any ground appearing in the evidence before us.

This consideration, and a portion at least of the defendants' con-

(a) 1 Y. & C. C. C. 98.

duct with reference to their disputes with the plaintiff, have made me doubt the propriety of dismissing his bill, a doubt
 * 256 increased by the view taken of * the case by my learned brother; and on the whole I think that I may, consistently with my duty, accede to the order proposed by him, which, if the bill ought not to be dismissed, is, I conceive, the right order to make.

THE ATTORNEY-GENERAL v. THE CORPORATION OF BEVERLEY.¹

1854. November 10, 11. December 13. 1855. January 17. Before the LORDS JUSTICES.

When an estate is given upon trust to pay to a charity an income exactly equal to the then rents, the charity is entitled to the benefit of any increase; and *semble*, that the same rule would be applied if a portion of the rents not given to the charity were wholly dedicated to the exoneration of rents that are so given from burdens which would otherwise fall on them; but the principle does not apply when the amount given to the charity does not equal the amount of the rent at the time.²

A testator in 1652 devised to a corporation a farm, which he described as yielding 47*l.* a year, in trust and confidence to pay three annual sums of 20*l.*, 10*l.*, and 10*l.* for certain specified charitable purposes, but subject, as to the 20*l.* per annum, to a life-interest which he gave in it to his sister. He also directed that so long as the taxes for the maintenance of soldiers should continue, what the corporation could not “spare out of overplus of rent, viz., 7*l.*,” should be deducted out of the annual sums in which his sister was not interested. By the same will the trustees were directed to purchase land sufficient to produce a certain income, the whole amount of which the testator directed to be applied in charity. The rents having increased, —

Held, that the whole income of the farm was not given to charity.

Held, also, that the corporation was not entitled to the whole surplus, but that the charity was entitled to forty forty-sevenths, and to have all necessary ordinary expenses of taxes, repairs, and costs of management paid out of the remaining seven forty-sevenths; and that, subject thereto, the seven forty-sevenths belonged to the corporation beneficially.³

¹ S. C., reversed, 6 H. L. Cas. 310.

² See Perry Trusts, § 725, and numerous cases cited in notes; Lewin Trusts (5th Eng. ed.), 131, and cases cited.

³ Reversed, Mayor of Beverley v. Attorney-General, 6 H. L. Cas. 310. See Lewin Trusts (5th Eng. ed.), 131; Merchant Taylors' Co. v. Attorney-General, L. R. 6 Ch. Ap. 512.

Semble, that it is the duty of an appellate jurisdiction to leave undisturbed a decision in which it is not thoroughly persuaded that there is error.

Where the Court sees clearly the intention of the founder of a charity, no argument founded on length of time can prevail against it.

THIS was the appeal of the defendants, the Corporation of Beverley, from a decree of the Master of the Rolls on an information seeking to have carried into effect certain charitable gifts contained in the will of Dr. Metcalfe, dated in 1652, and a codicil thereto. The case is reported below in the 15th volume of Mr. Beavan's Reports. (a)

The material parts of the will were the following:—

“Whereas I have purchased a messuage or farme *called or * 257 knowne by y^e name of Silliards situate lying and being in Gilden Murden in y^e County of Cambridge with one hundred and one acres of arable land and seven acres and an halfe of pasture and all other the appurtenances thereto belonging (now in y^e occupation of John Cooper) as they are more fully specified in an Indenture of Bargaine and Sale to mee my heires or assignes for ever bearing date y^e eight day of October in y^e yeare of our Lorde God according to the computation of the Church of England one thousand six hundred and fifty-one for y^e purchase of w^{ch} saide farme I paid the iust and full sune of eight hundred and forty pounds as is acknowledged in the said Indenture besides other necessary charges it yielding the yearely rent of forty and seven pounds I doe give and bequeath the said farme called Silliards wth all y^e said lands and appurtenances thereto belonging to y^e Maiour Aldermen and Burgesses of the Towne of Beverlay in Yorkshire wherein I was borne and to their successors for ever nevertheless in and wth this trust and confidence in them reposed y^e they their successors and assignes shall employ y^e yearely rent of the said farme with y^e lands and appurtenances in manner and forme following and not otherwise namely y^e they shall well and truly pay or cause to be paid yearely and every yeare for ever unto y^e preacher (as he is commonly called) or lecturer of y^e said Towne of Beverlay and his successors y^e sum of ten pounds of good and lawful money of England and to y^e schoole-master of y^e said Towne and to his successors in like manner y^e sum of ten pounds of good and lawful money of England and to my sister Prudence Metcalfe now dwelling in the said Towne of Beverlay during her naturall life y^e sum of twenty poundes of good and lawfull money of England yearely and every yeare And after y^e decease of my said sister Prudence Metcalfe y^e they shall well & truly pay * or cause to be * 258

paid the said twenty pounds yearely and every yeare for ever unto three poore scholars of the Schoole of Beverlay (comonly called y^e Free Schoole) naturally borne in y^e said Towne for their better maintenance at the University of Cambridge viz^t to every one of the three poore scholars the sume of six pounds thirteen shillings & fourepence y^e said three poore scholars to be appointed and approved from tyme to tyme by y^e said Maiour Aldermen & Burgesses and their successors and y^e lecturer & y^e schoolmaster of y^e said towne & their successors And y^e said maintenance to be continued to every of y^e said poore scholars untill y^e tyme that they have taken y^e degree of Master of Arts if they so long continue students in y^e University And upon condition that they take y^e said degree at y^e due tyme within eight yeares after their admission into y^e Universitie But if there be not allwaies three poore scholars at the University of Camb or ready to goe to the University who shall stande in need of that maintenance & be poore men's sons who are not able otherwise to maintaine their children there (for my will is that no son of any of the Aldermen or of any other who are of sufficient ability to maintaine their children at the University shal be capable of that maintenance) then I ordaine that in y^e interim till there shal be such poore scholar or scholars poore men's sons what can be spared of the said twenty poundes (no poore scholare having above six poundes thirteen shillings & foure pence yearely) shal be distributed amongst y^e poorest people of y^e said towne together with y^e money w^{ch} in this my will I shall hereafter mention Moreover my will and desire is that so long as y^e taxes or rates to y^e commonwealth for y^e maintenance of souldiers shall continue what y^e said Maiour Aldermen and Burgesses cannot spare out of y^e overplus of rent viz^t seven poundes (for y^e * 259 farme is now as was formally signified lett for forty * seven pounds per annum and so hath been lett heretofore) shal be deducted equally out of y^e twenty poundes per annum w^{ch} they are to pay to their lecturer and schoolemaster That my sister may have twenty pounds yearely & every yeare wholly and intirely paid unto her"

"I give and bequeath unto y^e Towne of Burwell in y^e County of Cambridge whereof I was Vicar y^e sume of thirty & two poundes & ten shillings therewith to purchase so much land as will yield yearly and every yeare for ever y^e sum of thirty shillings Neverthelesse in & with this trust & confidence in them reposed that they & their successors shall by their assigne or assignes distribute y^e said yearly rent of thirty shillings yearely every yeare for ever amongst y^e poorest people of y^e said Towne upon the twentieth day of December or upon the day before or after as shal be thought convenient And my will is that y^e said purchase be made w^{ch} in one yeare at y^e furthest after y^e said money shall be payd unto them by my executor"

"I give and bequeath to y^e Maiour Aldermen & Burgesses of y^e Towne of Beverlay aforesaid in Yorkshire & to their successors y^e sune of foure hundred & fifty poundes for y^e purchasing of so much free land as will yield yearely & every yeare the rent of twenty & two poundes & tenn shillings. Neverthelesse in and with this trust and confidence reposed in them y^e they & their successors by their assigne or assignes shall distribute twenty poundes of the saide rent yearely & every yeare for ever amongst y^e poorest of y^e people of their Towne upon y^e twentyeth day of December or y^e day before or after as shal be thought most convenient by y^e Maiour & Lecturer of y^e towne for y^e tyme being. And my will is y^e so long as y^e taxes and rates due to y^e Commonwealth for maintenance of souldiers shall continue y^e unless they * can spare anything out of * 260 y^e fifty shillings overplus y^e saide rates be defrayed out of y^e said twenty poundes yearely. My will also is y^e this purchase shal be made within one yeare & an halfe after y^e said money is paid to y^e said Maiour Aldermen & Burgesses by my executor at the furthest w^{ch} I hope my executor will see to."

The codicil was as follows:—

"Whereas in y^e fifth page of this my last will & testament there is mention made of a gift and bequest of foure hundred & fifty poundes to y^e Maiour Aldermen & Burgesses of y^e Towne of Beverlay in Yorkshire & their successors for y^e purchasing of twenty two pounds ten shillings in free land to be distributed yearly and every yeare unto y^e poorest people of that Towne for ever,—since y^e makeing of this my last will & testament, that purchase is made by me in Over & because a greater part of y^e land is copyhold so y^e I could not wthout y^e purchasing of a court dispose of it according to my desire and intent to y^e use of my last will and testament I also purchased a court to inable me y^e my heir might have nothing to doe therein. And y^e business being now dispatched my will is y^e that gift & legacy be disposed of according to y^e true intent and meaning specified in y^e saide fifth page there being no difference in anything but only y^e now a great part of y^e lands will be copyhold."

The mayor, aldermen, and burgesses of Beverley had been possessed of the estates derived under the devise since the death of the testator. The estate at Gilden Morden, which had been improved by an inclosure of open lands, was let to a yearly tenant at the annual rent of 130*l*. The estate at Over was let to a yearly tenant at the annual rent of 42*l*. The sum of 10*l*. a year

* 261 was regularly * paid to the lecturer of Beverley, for which he preached a sermon every Sunday, in the afternoon, in the Church of St. Mary. The sum of 10*l.* a year was paid to the master of the grammar school of Beverley, and yearly exhibitions of 6*l.* 13*s.* 4*d.* each were given to three scholars at the University of Cambridge, when there were applications for them from persons of the description mentioned in the will, and they were continued to the scholars for the time specified in the will. The residue of the 20*l.* provided for exhibitions, when there were exhibitions vacant, and the sum of 20*l.* out of the rents of the estate at Over, were distributed, with other charitable funds under the management of the corporation, at Christmas, among poor persons, inhabitants of the town.

The information prayed that it might be declared that according to the true construction of the said will and codicil of the testator, the surplus of the rents, after satisfying the said pecuniary payments, expressly specified in the will as aforesaid, ought to be applied to charitable purposes, and that the mayor, aldermen, and burgesses ought to account for such surplus, and that the mayor, aldermen, and burgesses might account for and pay such surplus from the time of filing the information, and that a scheme might be settled for the administration of the charity.

By the decree under appeal it was declared, that the defendants, the corporation, were beneficially entitled to so much of the increased rents of the charity estates in the pleadings mentioned as amounted to seven forty-seventh parts of the estate at Gilden Morden, and five forty-fifth parts of the estate at Over, but subject thereout to defray all necessary, ordinary expenses of taxes, repairs, and costs of management of the charity property ;
* 262 and it was declared that the * charity was entitled to the residue of such increased rents. An account was directed to be taken, and a scheme to be settled.

The Solicitor-General, Mr. Roupell, and Mr. T. H. Terrell, for the Attorney-General.

Mr. Lloyd and Mr. Cankrien, for the appellants.

The following authorities were referred to: *The Attorney-Gen-*
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eral v. The Drapers' Company; (a) The Attorney-General v. The Skinners' Company; (b) The Attorney-General v. The Coopers' Company; (c) Jack v. Burnett; (d) The Attorney-General v. The Mayor of Bristol; (e) The Attorney-General v. The Corporation of South Molton; (g) Stubbs v. Sargon; (h) Dawson v. Clark; (i) Pratt v. Sladden; (k) Walton v. Walton; (l) The Attorney-General v. Gascoigne; (m) and The Attorney-General v. The Master, &c., of Catherine Hall, Cambridge. (n)

1855. January 17.

THE LORD JUSTICE KNIGHT BRUCE. — The decree in this cause, as drawn up, does not seem to me to express with exact accuracy the construction put by the Master of the Rolls on Dr. Metcalfe's testamentary dispositions as to the estates in question, but, I think, shows with sufficient plainness for practical purposes what that construction was, and provides intelligibly * for' giving * 263 effect to it. This remark is one as to form merely.

With regard to the substance of the case, considering the language of the testator independently of the authorities, considering it also in connection with the authorities, and considering the manner in which (as I understand) during a great number of years that language has been practically interpreted, I have, after much attention to the matter, found myself unable to free my mind from doubt whether his Honor has taken the view that ought to be taken of the testator's meaning. But I doubt only. Seldom indeed, or never, have I met with a case to my apprehension of more difficulty; and, had the cause come before me originally, it is very possible that, from mere inability to arrive at a satisfactory conclusion, and from the opinion that in such circumstances it would not be right to disturb an existing state of things, I should have dismissed the information.

The suit is, however, before us under other conditions; for though, in a sense, we are rehearing it, yet, in a sense and accord-

(a) 2 Beav. 508.

(b) 2 Russ. 435.

(c) 3 Beav. 29.

(g) 14 Beav. 357; and on appeal, 5 H. L. Cas. 1.

(h) 2 Keen, 267; 3 Myl. & Cr. 507.

(i) 15 Ves. 409; 18 Ves. 247.

(k) 14 Ves. 193.

d) 12 Cl. & Fin. 828.

(e) 2 J. & W. 294.

(l) 14 Ves. 318.

(m) 2 Myl. & K. 647.

(n) Jac. 381.

ing to ordinary acceptation, this is an appeal, and the pleadings and evidence here being merely those which were before the Master of the Rolls, we must so view the matter. But it is, I apprehend, generally understood to be the duty of an appellate Judge to leave undisturbed a decision where he is not thoroughly persuaded that there has been error. It is, I believe, in appeals as much a rule or maxim of the English Court of Chancery, as it was of the civil law, that to doubt, to entertain grave and solid doubt, is to affirm; because to reverse is to disturb an existing state of things. Certainly, it has not been uncommon for Judges when reversing to avow that they have hesitated, and to express distrust; nor, considering that sometimes, or perhaps often, the Judge

appealed from is a man not less likely to be accurate than
 * 264 * the Judge appealed to, and how often reversals and affirmances are alike reversed, does it appear to me that this can justly be blamed. But still, in whatever form, and with whatsoever sincerity terms of deference and diffidence may be used, a reversal can scarcely proceed from a Judge fit for his office, without a conviction, in his own mind, that he is right.

I must, therefore, be for affirmance, wholly or substantially, in the present instance. It was, unless I mistake, stated at the bar that this appeal originated, mainly or solely, in a recent judgment of the House of Lords pronounced between the Attorney-General and the corporation of South Molton. The two cases, however, seem to me materially different, and the decree before us can well, I think, stand consistently with that authority, an authority from which, even if we were not, as we are, bound by it, I should not be prepared to dissent.

THE LORD JUSTICE TURNER. — This is an appeal from a decree of the Master of the Rolls, and the question arising upon it is, what are the rights of the parties in the surplus income of an estate made subject to some charitable trusts?

Robert Metcalfe, the testator, by his will, dated the 9th of October, 1652, devised as follows: [His Lordship read the material parts of the will, as set out above.] The testator has then given various legacies. By a codicil to his will—[His Lordship read the codicil.]

The Master of the Rolls has been of opinion, and by his decree has declared—[His Lordship read the decree.]

The corporation have appealed from this decree, contending that they are entitled to the whole surplus income * of * 265 the Gilden Morden estate, after deducting the 40*l.* per annum given to the preacher, schoolmaster, and poor scholars; and to the whole surplus income of the Over estate, after deducting the 20*l.* per annum given to the poor; and the corporation having thus opened up the decree, it has been contended before us, on the part of the Attorney-General, that the charities interested in the respective estates are respectively entitled to the surplus incomes of those estates.

It will be convenient first to consider the case made on the part of the Attorney-General. It is now well settled, that if the whole amount of the rents and profits of an estate as they stand at the time be given to a charity, the charity is entitled to the benefit of any increase in those rents and profits, the disposition of the whole rents and profits being considered to amount to a disposition of the estate; and (although I am aware of no case to that effect) I presume that the same rule would be applied if a portion of the rents and profits, not given to a charity, be wholly dedicated to the exoneration of the portion of rents, which is so given, from burdens which would otherwise fall upon it;¹ but, if the whole rents and profits be not given to or for the benefit of the charity, the principle on which the rule is founded ceases to have any application; and I can find no case in which in such a state of circumstances the rule has been held to apply.

Now in the case before us the whole rents and profits are clearly not given to the charity, and the portion of the rents and profits not so given is not wholly dedicated to the exoneration of the portion which is so given; for, as to the Gilden Morden estate, the will shows that the testator must have contemplated that, at some future time, the portion of the rents not given to the charity would * exceed the taxes upon the estate; and as to the * 266 Over estate he is wholly silent as to the surplus of the rents beyond what is given to charity. There is in the present case also this circumstance to be considered,—that if the increase of the rents had taken place in the lifetime of the testator's sister, it would be scarcely possible to say that he could have intended the charities to take the benefit of the increase; and it is further to be

¹ See *Merchant Taylors' Co. v. Attorney-General*, L. R. 6 Ch. Ap. 516, Lord HATHERLEY, L. C.

observed that where the testator intended the whole income to go to charity, he has so expressed it, as in the case of the disposition in favour of the poor of Barwell. I think, therefore, that the claim to the whole increased income put forward on the part of the Attorney-General on behalf of the charities cannot be maintained.

As to the case of resulting trust, which has been suggested, this record is not I think, properly framed to raise that question, and I therefore give no opinion upon it; but I desire it to be understood that in being silent upon this point, I am not to be considered as acquiescing in the opinion that such a case could ever have been maintained, and much less in the opinion that it could now be successfully brought forward.

The claim of the Attorney-General, on behalf of the charities, to the whole income being disposed of, the remaining question upon this record is, whether the increased income belongs wholly to the corporation or is to be apportioned between the corporation and the charities, according to the declaration contained in the decree. This question seems to me to depend upon a short point, — whether, upon the true construction of this will, the corporation was intended to take apportioned parts of certain rents or the residue or surplus of the rents, whatever those rents might be.

* 267 In the former case * *The Attorney-General v. The Drapers' Company* (a) would apply: in the latter the case would be governed by *South Molton Corporation v. The Attorney-General*, (b) as decided in the House of Lords. We must consider, therefore, what is the true construction of this will; and, upon examining it, I am satisfied that the intention was, that the corporation should take only apportioned parts of the yearly rents, paying out of the apportioned parts the burdens upon the estates respectively. As to the Gilden Morden estate, the disposition commences by stating the then yearly rent to be 47*l*. The testator then proceeds to devise the estate to the corporation, but in trust that they shall employ the yearly rent which, looking at the context, must, I think, be understood to mean the then yearly rent, the 47*l*., which he had before mentioned, in manner following, and no otherwise. He then proceeds to declare the trusts for the charities, but the express declaration of trust does not extend beyond 40*l*. a year;

(a) 2 Beav. 508.

(b) 5 H. L. Cas. 1.

and if the will had stopped at this point there would have been ground to contend that the case ought to be governed by *The Attorney-General v. The Mayor of Bristol*,^(a) but the testator adds, "Moreover my will and desire is that so long as the taxes of rates to the commonwealth for the maintenance of soldiers shall continue, what the said mayor, aldermen, and burgesses cannot spare out of the overplus of rent, viz. 7*l.* (for the farm is now, as was formerly signified, let for 47*l.* per annum, and so has been let heretofore), shall be deducted equally out of the 20*l.* per annum which they are to pay to their lecturer and schoolmaster, that my sister may have 20*l.* yearly and every year wholly and entirely paid unto her," and this clause shows what the corporation were to take. They were to take the overplus of the rent, for they were to pay the taxes out of it; but then the clause defines the amount of the overplus * which they were to take, viz. 7*l.* * 268

If the intention had been that the corporation should take the overplus of the rent, whatever that overplus might be, there would have been no occasion for the introduction of the 7*l.* under the videlicet. This clause, coupled with the mention in the previous part of the will of the precise amount of the rent, seems to me plainly to show what was the intention of the testator as to the Gilden Morden estate, and I think the language of the will affords no less plain an indication of the same intention as to the Over estate.

In the argument on the part of the appellant some reliance was placed upon the Bristol case, which I have already mentioned, but in that case the surplus referred to was not of a certain definite amount, a circumstance which entirely distinguishes it from the present case.

The appellants' main reliance, however, was upon the South Molton case as decided by the House of Lords, which was said to affect the authority of the Drapers' Company's case. This appeal indeed was directly attributed to the South Molton case, but no two cases can be more distinguishable than the present case and the South Molton case, for the disposition in the South Molton case was plainly of the residue of the rents, whatever that residue might be. There is nothing which I can find in the South Molton case to impeach the authority of the Drapers' Company's case, a case which certainly does not stand by itself.

(a) 2 J. & W. 294.

The appellants also relied upon the length of time, but if the Court clearly sees what the intention of the testator was, and that there has been a breach of trust in the non-observance of that intention, I apprehend that no argument founded on the length of time can prevail. Upon the whole my opinion in this case agrees with that of the Master of the Rolls, and the appeal there-
 * 269 fore must * be dismissed, but as the question was certainly open to very serious doubts, I think it must be dismissed without costs.¹

By the decree made on the appeal the declaration contained in the decree at the rolls was varied as follows: Declare that according to the true construction of the will forty undivided forty-seventh parts of the rents and profits of the estate in Gilden Morden were applicable and ought to be applied to and for the charitable intents and purposes in the said will declared concerning the same, without any deduction therefrom for or in respect of the necessary ordinary expenses of taxes and repairs or the costs of management of the said estate, and that the remaining seven undivided forty-seventh parts of the said rents and profits were applicable and ought to be applied in the first place in payment of all necessary ordinary expenses of taxes, repairs, and costs of management of the whole estate, and subject thereto belonged to the said defendants the mayor, aldermen, and burgesses of the town of Beverley for their own use and benefit; and that forty undivided forty-fifth parts of the rents and profits of the estate at Over were applicable and ought to be applied to and for the charitable intents and purposes by the said will declared concerning the same, without any deduction therefrom for or in respect of the necessary ordinary expenses of taxes and repairs or the costs of management of the said last-mentioned estate, and that the remaining five undivided forty-fifth parts of the said last-mentioned rents and profits were applicable and ought to be applied in the first place in payment of all necessary ordinary expenses of taxes, repairs, and costs of management of the whole of the said last-mentioned estate, and subject thereto belonged to the said defendants the mayor, aldermen, and burgesses of the town of Beverley for their own use and benefit.

¹ See S. C., 6 H. L. Cas. 310, where the entry made was: "Decrees reversed, and cause remitted to the Court of Chancery, with a declaration that the information ought to be dismissed."

* JORTIN v. The SOUTH-EASTERN RAILWAY * 270
COMPANY.¹

1854. December 2, 7, 8, 11, 12. 1855. January 18. Before the LORDS JUSTICES.

A harbour company was empowered by its Act of incorporation to raise money on mortgages of the works and tolls, which were not to be effectual until they were entered in the company's books by its clerk, and a memorial of the entry was indorsed on them: —

Held, that an unindorsed mortgage, regular in other respects, was effectual.

Such provisions as these respecting the indorsement depend on the purpose of the Act. If it be one of public concern, they are construed largely, as in the Annuity Acts, Shipping Acts, and the modern statutory provisions for registering judgments; but if not, the effect is limited by the purpose of the Act.

The true meaning of the Exchequer Loan Commissioners Acts is, that the commissioners have power to sell property comprised in their securities as against all persons over whom they have an absolute priority, but not as against prior incumbrancers, except so far as these may have conceded their priority. Therefore, where prior mortgagees of the works and tolls of a harbour agreed that, on the commissioners making an advance, the tolls should be applied — first, in paying interest on the commissioners' advances; secondly, in paying interest on the prior mortgages; thirdly, in reduction of the principal of the commissioners' advance till it was paid off, and, the tolls being insufficient to keep down the interest on the commissioners' advances, they sold the subject of their security to a railway company with notice of the agreement: *Held*, that the purchasers took subject to the charge of the prior mortgagees in respect of the interest on their securities.

The above agreement was made in 1818. In 1833, before the sale to the railway company, one of the prior mortgagees wrote to the treasurer of the harbour company complaining of non-payment of interest. The treasurer replied that no interest had been paid since 1821, as the income of the harbour left but a small surplus after payment of expenses, but that he was at all times willing to give information to the mortgagee or to any other gentleman who had embarked property in the undertaking: *Held*, that the agreement and the correspondence took the case out of the Statute of Limitations both as to principal and interest.

The above mortgages were in the nature of a Welsh mortgage, being in a form prescribed by the Harbour Act, whereby the works and tolls were demised until the mortgages were paid off: *Held*, that, whether the mortgagees could proceed at law or not, they were entitled to sue in equity.

THIS was the appeal of the defendants the South-Eastern Railway Company from a decision of Vice-Chancellor STUART, reported

¹ S. C., reversed, 6 H. L. Cas. 424.

in the second volume of Messrs. Smale and Giffard's Reports, (a) where the facts are fully stated.

The nature of the arguments adduced on the appeal appear sufficiently from the judgment.

* 271 * *Mr. Roundell Palmer, Mr. Bailey, and Mr. Charles Hall* were for the plaintiff.

They referred to *Willis v. Brown*, (b) *Hodson v. Sharpe*, (c) *Stansfield v. Hobson*, (d) *Sandon v. Hooper*, (e) *Burrell v. Lord Egremont*, (g) and *Tunstall v. Trappes*. (h)

The Solicitor-General, Mr. Wigram, Mr. Malins, and Mr. Pole, for the defendants.

They cited and commented on *Beere v. Head*, (i) *Foster v. Smith*, (k) *Hodges v. The Croydon Canal Company*, (l) *Doe v. Lightfoot*, (m) *Whippy v. Hillary*, (n) *Routledge v. Ramsay*, (o) *Cawley v. Furnell*, (p) *Holland v. Clark*, (q) *Du Vigier v. Lee*, (r) and *Neve v. Hollands*. (s)

Mr. Bailey, in reply, referred to *Holmes v. Kerrison*, (t) and *Way v. Bassett*. (u)

Judgment reserved.

1855. January 18.

THE LORD JUSTICE TURNER. — This is an appeal from a decree of the Vice-Chancellor STUART.

The plaintiff in the suit claims to be entitled to several
* 272 * mortgages made by the Folkestone Harbour Company under the powers of their Act of Parliament (47 Geo. 3,

(a) Page 48.

(b) 10 Sim. 127.

(c) 10 East, 350.

(d) 3 De G., M. & G. 620.

(e) 6 Beav. 246.

(g) 7 Beav. 205.

(h) 3 Sim. 286.

(i) 3 Jo. & Lat. 340.

(k) 2 Y. & C. C. C. 193.

(l) 3 Beav. 86.

(m) 8 M. & W. 553.

(n) 3 B. & Ad. 399.

(o) 8 Ad. & Ell. 221.

(p) 12 C. B. 291.

(q) 1 Y. & C. C. C. 151.

(r) 2 Hare, 326.

(s) 16 Jur. 933.

(t) 2 Taunt. 323.

(u) 5 Hare, 55.

c. 2) to various persons, by whom the same were afterwards transferred to John Jortin, the plaintiff's testator. The property comprised in these mortgages was subsequently mortgaged by the company to the exchequer loan commissioners, by whom it was sold to the South-Eastern Railway Company, and the bill is filed for the purpose of enforcing against that company the mortgages in which the plaintiff is interested.

The defendants, the railway company, resist the claim of the plaintiff upon the following grounds: 1st. That the mortgages in which the plaintiff claims to be interested are wholly invalid and ineffectual. 2d. That the exchequer loan commissioners had power to sell and have sold the property to them, discharged of the prior mortgages. 3d. That the rights of the plaintiff, if any, are barred by the Statute of Limitations, or, at all events, that the plaintiff's claim for interest is to a great extent barred by that statute; and, 4th, that the plaintiff's remedy, if any, is at law.

These grounds of objection to the plaintiff's claim were urged before the Vice-Chancellor, and he was of opinion that they could not be maintained, and accordingly made a decree in substance, enforcing against the defendants the rights claimed by the plaintiff. The appeal before us is from that decree.

The Folkestone Harbour Company was incorporated by an Act 47 Geo. 3, c. 2, by which power was given to the company to construct a pier, harbour, wharfs, warehouses, and other buildings, and to levy certain rates, tolls, and duties; and the company was empowered to borrow any sum, not exceeding 8000*l.*, upon mortgage. * The provisions of the Act as to the money to * 273 be borrowed upon mortgage, are as follows: By section 23, it is enacted, "That in case the company of proprietors shall deem it expedient to borrow money for the purpose of enabling them to carry on the works aforesaid, it shall and may be lawful to and for them, and they are hereby authorized and empowered, from time to time, to borrow and take up at interest, on the credit of the rates and duties of the said harbour, any sum or sums of money which they shall deem necessary for effectuating the purposes of this Act, not exceeding 8000*l.*, and to demise, grant, bargain, and sell the property of the said harbour and the capital stock therein, and the tolls, rents, and duties arising or to arise to the said company of proprietors by virtue of this Act (the costs and charges of preparing such demise or demises to be paid out of such tolls,

rates, and duties) as a security for any sum or sums of money which shall be so borrowed with interest." Then it provides that the security may be in the form or to the effect following: "By virtue of an Act of Parliament, &c., we, the Folkestone Harbour Company, in consideration, &c., do hereby demise, grant, bargain, and sell unto A. B., his executors, administrators, and assigns, the aforesaid harbour and buildings belonging thereunto, and all and singular the rates, rents, and duties payable by virtue of the said Act, and all our right, title, and interest of, in, and to the same, to be holden by the said A. B., his executors, administrators, and assigns, from the day of , until the said sum, with the legal interest thereon, shall be fully paid and satisfied, which demise, in form aforesaid, shall be as valid and effectual for securing the repayment of the money therein mentioned as any mortgage or demise drawn in any other manner, and shall be construed equitably by all Courts according to the intent thereof." Then

* 274 the 24th section gives the form for the transfer of * mortgages, and the 25th section enacts, "That such demises and transfers shall be entered or a memorial thereof made in the book or books of the company, by the clerk or clerks to the said company, and that he or they shall also indorse on such demises and transfers a memorandum of such entry or memorial, and until such entry or memorial shall be made of such demises and transfers, and such indorsements made thereon, the same shall not be valid or effectual," making, therefore, the validity of the mortgage to depend as well upon the entry or memorial as upon the indorsement. Then the 26th section provides that the interest of the mortgage money shall be provided for and paid to the persons entitled to receive it, prior to making any dividends to the proprietors. The 27th section of the Act enacts that six calendar months' notice shall be given by the company to pay off or by the mortgagees to call in their mortgages.

The mortgages upon which the plaintiff's claim is founded were created under this Act. They were entered in the company's books, and the transfers of them were also so entered, but with one exception only, neither the mortgages nor the transfers were indorsed by the clerk of the company, and it is upon this ground, that the defendants, relying upon the 25th section of the Act, contend that they are not valid or effectual. Provisions of this description are not uncommonly found in Acts of Parliament, and the effect to

be given to them depends, as I apprehend, very much upon the purpose of the Act in which they are contained. If the Act be one of general public concern, they are to be construed largely to defeat the mischief which the Act was intended to prevent, as in the case of the Annuity Acts, the Ship Registry Acts, and the modern statutes for the registration and re-registration of judgments; but if the Act be not one of * general public * 275 concern, the effect to be given to such provisions is limited by the purpose for which they were inserted. Thus, before the recent statutes, an unregistered judgment was available against a purchaser with notice, though the Act was express that no judgment should affect lands but only from the time when the judgment should be registered; and so a bargain and sale, not enrolled, prevailed against a subsequent bargainee with notice, notwithstanding an express provision in the statute that the lands should not pass, except the bargain and sale was enrolled. Such provisions are not to be construed to destroy a pre-existing right, except so far as the policy of the law may be aimed at the destruction of it.

Here there was an undoubted right on the part of the mortgagees, under whom the plaintiff claims, to have the indorsement put upon their mortgages, and there is no public policy requiring us to hold that the Act was intended to destroy that right. Whatever may have been the object with which this provision as to indorsement was inserted in the Act, I am satisfied that it was not inserted with any such object as this. To hold that it was, would be to put it in the power of the company to defeat their own security by their own default. I think, therefore, that this ground of defence wholly fails; that, notwithstanding the absence of the indorsements, the company were bound by the plaintiff's securities; and that the defendants, who, as it will presently appear, take under the company with notice, are equally bound by them.

The second ground of defence is, that the exchequer loan commissioners had power to sell and have sold to the defendants, discharged of the plaintiff's mortgages. This question involves the consideration of the Exchequer * Loan Com- * 276 missioners' Acts, but before referring to them, it is necessary to state the circumstances under which the question arises. The mortgage by the company to the exchequer loan commissioners was for the sum of 10,000*l.*, and was made by a deed dated the 15th of April, 1818. Before the execution of this deed there was

a treaty between the exchequer loan commissioners and the prior mortgagees, now represented by the plaintiff, which resulted in an agreement between them, dated the same 15th April, 1818. This agreement was as follows: "Whereas the commissioners for the issue of certain exchequer bills, under the Act of the 57 Geo. 3, c. 34, and another Act of the same session, amending the Act, have consented to advance and lend the Folkestone Harbour Company the sum of 10,000*l.* in exchequer bills, to be applied in completing the said harbour, and to be secured by a mortgage of the rates, duties, and receipts now payable, or which may become payable under and by virtue of the said Acts, now these presents witness, that we whose names are hereunto subscribed, being the present mortgagees or creditors of the company, who have respectively and *bond fide* advanced money by way of loan to the said Folkestone Harbour Company, upon the several securities now held by us and each of us respectively, or to which we, or any or either of us, may be entitled in consequence of any advances so made or agreed to be made by us, or any or either of us, as aforesaid, do hereby severally and respectively consent and agree that any mortgage or other security which shall be taken by the said commissioners in the name of their secretary for the time being, or otherwise, of the rates, duties, and receipts of the said harbour company, to secure the repayment of the said loan of 10,000*l.* and interest, in the manner specified in such mortgage or mortgages, shall have prior-

ity over the respective securities now held or hereafter to be
 * 277 held by * us or by any or either of us in manner following,

that is to say, that the said commissioners shall, in the first place, be annually paid out of the said rates, duties, and receipts, interest at the rate of 5*l.* per cent per annum on the said sum of 10,000*l.*, or upon such part thereof as shall from time to time remain due and unpaid, and, in the next place, that we whose names are hereunto subscribed shall be annually paid out of such rates, duties, and receipts such interest as may from the date of the said mortgage, to the secretary of the said commissioners, become due to us respectively, by virtue of the respective securities now held by us, or to which we or any or either of us may be entitled as aforesaid, and after such respective payments of interest as aforesaid, the surplus of the said rates, duties, and receipts shall be applied in the discharge of the principal sum of 10,000*l.*, at such periods and in such proportions as shall be specified in the

mortgage to the secretary of the said commissioners, until the whole of the said sum of 10,000*l.* shall be repaid, in preference to and with priority over all claims and demands whatsoever, which we or any or either of us may have to the repayment of the several principal sums of money advanced by each of us respectively, any thing contained in the said last-mentioned Acts, or in any mortgage, assignment, or other security, now held by us or any or either of us respectively, or to which we or any or either of us may be entitled, upon such rates, duties, and receipts, to the contrary thereof notwithstanding."

The interest of the exchequer loan commissioners soon fell into arrear, and, in the year 1839, they entered into possession; but the income being insufficient to keep down their interest, the arrear continued to increase, and ultimately in the year 1843, when 8000*l.* and upwards was due to them for arrears of interest, they sold to the * defendants the railway company. The convey- * 278
ance by them to the defendants was by a deed dated the 21st of April, 1843. This deed recites the Acts of Parliament of the exchequer loan commissioners, the Folkestone Harbour Act, the mortgage, and the agreement at very great length, and then recites that the Folkestone Harbour Company had paid the interest which had become due in respect of the loan up to the 15th of April, 1821, but had paid no interest since that time, and recites the fact that the commissioners had entered into possession, and that the clear amount of receipts had been applied in reduction of the money due to the commissioners in respect of their security, but that no part of the principal loan had been paid or satisfied, and that the arrears of interest then due after giving certain credits amounted to 8045*l.* 17*s.* 7*d.*, and that the secretary of the commissioners under their order, in execution of the powers vested in them by their Acts, had contracted with the trustees of the railway company for the absolute sale to them of all the tolls, rates, receipts, freehold and leasehold hereditaments, powers, rights, and privileges vested in them by virtue of the indenture of mortgage of the 15th of April, 1818, except certain tolls which were then due, for the price or sum of 18,000*l.*; and it recites that the commissioners had agreed to join in the conveyance. Then there is a conveyance to the trustees of the railway company in consideration of 18,000*l.* of "all and singular the tolls, rates, receipts, and freehold and leasehold messuages, lands, tenements, and hereditaments respec-

tively, comprised in the said indenture of mortgage of the 15th of April, 1818, or expressed to be thereby assigned or assured, and as to the said tolls, rates, and receipts henceforth to accrue and become payable, and all the estate, right, title, and interest," &c.,

to the use of the trustees of the railway company. Then

* 279 there is a further assignment by the secretary of the * commissioners to the trustees of the 10,000*l.* secured by the mortgage and of all rights in respect of that security, keeping alive therefore the 10,000*l.* debt due from the Folkestone Harbour Company to the exchequer loan commissioners.

The deed, it is to be observed, upon the face of it, gives notice to the defendants, the railway company, of the prior mortgages, and of the agreement which had been entered into by the exchequer loan commissioners with respect to them. The question is, whether, having regard to that agreement, the exchequer loan commissioners had, under their Acts, power to sell the property discharged of those prior mortgages.

The first two of these Acts, which were passed in the 57 Geo. 3, (a) enable the commissioners to make advances for carrying on public works upon securities to be given by the persons applying for the advances and upon the security of the rates, tolls, and receipts accruing to the corporations, companies, or persons interested in the works in respect of which the advances shall be made; and the earlier of these Acts contains the following provisions as to the priority of the securities to be taken by the commissioners. By sect. 22 of this Act it is enacted, "That in all cases of assistance afforded by the loan or advance of any bills or money under the provisions of this Act for the carrying on of any such public works, collieries, or mines, the several commissioners for the execution of this Act shall, in addition to the security required to be taken from the persons applying for such assistance, require and take mortgages, assignments, or other competent security upon the rates, tolls, and receipts accruing, or which may at any time thereafter accrue, arise, or be taken, collected, or received by or

for the use of the body corporate or politic or company of

* 280 * proprietors or persons interested in the public work in respect or in aid of which the advance of bills or money under this Act shall have been made for the securing the repay-

(a) cc. 34 & 124.

ment of the full amount of the bills or money advanced, together with all interest which may arise and become due upon such amount; and it shall be lawful for any such body corporate or politic, or for the company of proprietors to whom any such public work shall belong, or for the respective trustees, commissioners, committees of management or other persons by whatever name or names called, under whose care, management, or control any such public work shall be, to mortgage, assign, and secure such rates, tolls, or receipts to the secretary of the said commissioners respectively, in such manner as shall be required by the said commissioners respectively, and also to any person or persons who shall have become security for any advances made under the provisions of this Act as a collateral security to the person or persons who shall have entered into any such security for the due and full payment of the full amount of all bills or money so advanced, together with interest thereon according to the provisions of this Act; and all such mortgages, heritable bonds, assignments, and other securities shall have priority over and shall precede all other securities and all dividends and divisions of profit or interest upon any sums advanced or contributed, or which may thereafter be advanced or contributed, for the carrying on or completing any such public work, save and except such sums as shall have been advanced by way of loan before the advance of such bills or money by any persons as *bond fide* creditors, and entitled as such to the repayment of the principal money advanced by them, as well as interest thereon, any thing contained in any Act or Acts of Parliament relating to any such public work in aid or in respect of which any such bills or money shall have been advanced under the provisions of this Act to the contrary * in any wise notwithstanding.” Then the 23d section provides that if four-fifths of the creditors consent, the mortgage of the tolls to the commissioners shall have priority to all claims of creditors of the like description, — that is, four-fifths of the creditors are to bind the remaining one-fifth and to give priority to the commissioners as to the whole of the commissioners’ incumbrance.

There can be no doubt, therefore, that the securities to be taken by the commissioners under these Acts were to be subject to any prior advances, and whether secured by mortgage or not, except in the cases of consent, provided for by the 24th section. The next Act, 1 Geo. 4, c. 60, gives further powers to the commission-

ers, and, amongst others, a power of sale in default of payment of any part of the principal. The 19th section is as follows: "And be it further enacted, that if any default shall be made in the repayment (but not otherwise) of all or any part of any loan or advance which has been or shall be secured to the said commissioners in part or in the whole by any mortgage or assignment of any interest, property, or effects whatsoever (real or personal), it shall and may be lawful for the said commissioners or such person or persons as shall be nominated and appointed by any three or more of them in writing to take possession of all or any parts or part of such mortgaged or assigned interest, property, or effects, and by sale or mortgage of the same, or a competent part thereof, to raise or levy such sum or sums of money as shall be sufficient to repay all moneys due upon or in respect of such loan or advance and the interest thereof, and all costs and charges attending such proceedings; and the moneys so recovered (the costs and charges aforesaid excepted) shall be paid and applied in the reimbursement

and satisfaction of the sum due upon or in respect of such * 282 loan or advance in like manner as the sums of money * to be recovered under the proceedings authorized by the said recited Acts in default of payment are thereby directed to be paid and applied; and the receipt of such persons or person as the said commissioners or any three or more of them shall nominate and appoint as aforesaid shall alone be a full and sufficient discharge to such mortgagees or purchasers, or mortgagee or purchaser, for the moneys or money advanced on mortgage, or for the purchase-moneys or purchase-money of the respective interest, property, or effects so mortgaged or sold, and such mortgagees or purchasers, or mortgagee or purchaser, shall not be bound to see to the application thereof, nor shall be liable or in any manner accountable for the misapplication or non-application of such moneys or money by the persons or person appointed by the said commissioners as aforesaid, or any part of them."

It is plain, however, that this section only extends to the interests mortgaged to the commissioners. It empowers them to take possession of the mortgaged or assigned interest, property, and effects, and by sale or mortgage of the same, &c. The interests of prior mortgagees, therefore, could not be affected by the power. The next statute, 3 Geo. 4, c. 86, renders it imperative on the commissioners to take security, not only on the rates, tolls, and

receipts, but on all the property belonging to the works in respect of which the advances shall be made, and it contains the following provisions as to the priority of the commissioners' securities. By the 17th section it is enacted, "That in all cases of assistance afforded by the loan or advance of any exchequer bills under the provisions of the said recited Acts, or any of them, or this Act, for the carrying on, completion, or repair of any public work, road, railway, or drainage, it shall be lawful for the said commissioners for the execution of the said recited Acts, and this Act, and they are hereby authorized * and required, to take from the * 283 body politic or corporate, or company or companies of proprietors interested in such public work, or the trustees, commissioners, or other parties having the care or management of such roads, railways, or drainage, and applying for such assistance, mortgages, assignments, or other competent security of such public works and undertakings respectively, and of all property of what nature or kind soever belonging thereto, and of the rates, tolls, and receipts of what nature or kind soever accruing, or which may at any time thereafter accrue, arise, or be taken, collected, or be received by or for the use of the body politic or corporate, or company of proprietors, trustees, or commissioners, or other parties or persons interested in the public work, road, railway, or drainage in respect or in aid of which the advance of exchequer bills under the said recited Acts, or any of them, or this Act, shall be made, for the securing the repayment of the full amount of the exchequer bills advanced, by instalments to a sufficient amount in the whole to repay the principal money advanced within the period of twenty years from the date of the said advance, and the first of which instalments shall commence and be payable within the period of five years at furthest from the date of such advance, with interest at the rate of 4l. per cent per annum on the principal from time to time remaining due ; and it shall be lawful for any body politic or corporate, or any company of proprietors to whom any such public work shall belong or the trustees, commissioners, or other parties or persons by whatever name or names called, under whose care, management, or control any such public work, road, railway, or drainage shall be, and they are hereby severally and respectively authorized and required, to mortgage, assign, and secure such public works and undertakings respectively, and all property as afore-

said belonging thereto, and such rates, tolls, or receipts,
 * 284 to the secretary of the said commissioners, in such * manner
 and form as the said commissioners shall direct and ap-
 point; and all such mortgages, assignments, and other securities
 shall have priority over and shall precede all other securities and
 all division of profit or interest upon any sums advanced or con-
 tributed or which may thereafter be advanced or contributed for
 the carrying on or completing of any such public work, road, rail-
 way, or drainage, save and except such sums as shall have been
 advanced by way of loan before the advance of such bills or money,
 and for securing of which said previous advances, mortgages, as-
 signments, or other securities shall have been given or executed to
 any person or persons as *bond fide* creditors and entitled as such
 to the repayment of the principal money advanced by them as well
 as interest thereon, any thing contained in any Act or Acts of
 Parliament relating to such public work, road, railway, or drain-
 age, in aid or in respect of which any such exchequer bills have
 been or shall be advanced under the provisions of the said recited
 Acts, or any of them, and this Act, to the contrary in any wise not-
 withstanding." Then there is by section 18 the same power given
 to four-fifths to bind the entire body as was given by one of the pre-
 ceding Acts.

This Act also by section 25 vests in the commissioners and
 their vendees the corporate rights of companies to whom advances
 may have been made, but it contains no further provisions for giv-
 ing effect to sales by the commissioners. It limits, however, the
 priority over the commissioners' securities to cases in which secu-
 rities have been given for the previous advances. The next Act,
 1 Will. 4, c. 24, is still more precise upon this last point, for sec-
 tion 20 is this: "Whereas doubts have arisen as to the extent
 of the priority of mortgages, assignments, or other securities taken
 by the commissioners for advances made under the authority

* 285 of the said recited * Act, for remedy whereof be it declared
 and enacted, that in all cases where such mortgages, as-
 signments, or other securities shall have been or shall be taken by
 the said commissioners as aforesaid for securing the repayment of
 any loan, whether of bills or money under the said recited Acts,
 or any of them, or this Act, all such mortgages, assignments, and
 other securities, have and shall have priority over and precede all

other liabilities, claims, and securities whatsoever chargeable on the property included in such mortgages, assignments, or other securities, and all dividends and division of profit or interest upon any sums advanced or contributed, or which shall or may thereafter have been advanced or contributed for the carrying on or completing of any such public work, road, railway, or drainage, save and except only such sums as shall have been advanced by way of loan before the advance of such bills or money, and for securing of which said previous advances, mortgages, assignments, or other securities shall have been given and executed to any person or persons *bond fide* creditors and entitled as such to the repayment of the principal money advanced by them, as well as interest thereon, any thing contained in any Act or Acts of Parliament relating or which may hereafter relate to any such public work, road, railway, or drainage, in aid or in respect of which any such exchequer bills or money shall have been or shall be advanced under the provisions of the said recited Acts, or any of them, or this Act, to the contrary in any wise notwithstanding." Then follows the clause that empowers the commissioners to take possession in default of payment of interest and also to concur in leases.

It thus distinctly gives priority to the commissioners over advances which have not been secured, doing away with all doubts which might otherwise have been raised upon the first Act; and, by section 21, it extends the cases * in which the * 286 power of sale may be exercised to cases of default in payment of interest, but I find nothing in this Act extending the property over which the power of sale is to ride, or giving any right to sell so as to affect the prior mortgagees.

The two next Acts do not appear to me to contain any thing of importance to the question before us; and we come then to the last Act to which we have been referred, 5 Vict. c. 9. This Act contains the following provisions: Section 18 gives power to the commissioners to concur in leases, sales, and other dispositions of property that may be mortgaged to them. Section 19 enacts (which had not been provided for by the previous Acts) that, where the commissioners sell, they may retain out of the proceeds of the sale, not merely the amount which was actually due at the time, but future instalments, which are secured by the mortgage, the mortgage being under the previous provisions made payable by

instalments. The 20th section enacts, " That if and when the said commissioners have sold or made any absolute disposition, or shall hereafter sell or make any disposition, of any public works, interest, property, or effects whatsoever, of which they may have taken or shall take possession in pursuance of the powers contained in any of the said recited Acts, or this Act, the same public works, interest, property, or effects shall, in respect and to the extent of the estate or interest so sold or otherwise disposed of, be held freed and discharged from all claim and demand of the persons, parties, bodies politic, corporate, or collegiate, or companies, by whom the same were conveyed or transferred to the said commissioners or to their secretary, and of all persons or bodies claiming under them, and in all respects as if such persons, parties, bodies politic, corporate, or collegiate, or companies making

* 287 such conveyance or transfer, and all persons * or bodies claiming under them, were, in all respects, to such extent as aforesaid, foreclosed from all equity or right of redemption of or in respect of the premises so sold or disposed of; provided, nevertheless, that nothing herein contained shall be taken or construed to prejudice the rights and remedies of any persons or parties, bodies corporate, politic, or collegiate, or companies, as against the said commissioners or their secretary, for or in respect of any surplus of the moneys which shall or may arise or be produced by, or in consequence of, such commissioners or their secretary, or any other person or persons, on their account, entering into possession and conducting, carrying on, or managing of such works, interest, property, or effects, or by or in consequence of their entering into the receipt of such tolls, rates, rents, or other profits of such works, interest, property, or effects, or by or in consequence of the said commissioners selling or otherwise disposing thereof as aforesaid, after paying and discharging all the costs, charges, and expenses of or incident to such entering into possession of such works, interest, property, or effects, or the conducting, managing, or carrying on the same, or receiving or collecting of such tolls, rates, rents, and profits, or of the selling and disposing of such works, interest, property, or effects as aforesaid, and also, after paying and discharging all the principal, interest, or other moneys which shall, for the time being, be due or owing on the security of the same works, interest, property, or effects, tolls, rates, or rents respectively, under or by virtue of the provisions of

the said recited Acts or this Act, or any or either of them, and which clear surplus moneys, together with all such estate or interest (if any) of and in the said works, interest, property, or effects, tolls, rates, rents, and profits (if any) which shall remain unsold or undisposed of, after payment of all such costs, charges, and expenses, principal, interest, or other moneys, shall result in equity or * belong to such persons or parties, * 288 bodies corporate, politic, or collegiate, or companies respectively, and be accounted for or reconveyed or reassured to them respectively accordingly: provided, nevertheless, that in case, at any public auction to be held for the sale or disposition of any public works, interest, property, or effects whatsoever, by order of the said commissioners under the powers of any of the said recited Acts or of this Act, the same public works, interest, property, or effects shall be bought in by, or by the order of, the commissioners, in consequence of the highest *bond fide* bidding at such auction for such public works, interest, property, and effects not being equal to the amount of principal, interest, or other moneys, for the time being, remaining owing on the security of such public works, interest, property, and effects, then, and in such case, it shall and may be lawful for such commissioners at any time thereafter to sell and dispose of the same public works, interest, property, and effects, either by public auction or by private contract, upon such terms and under and subject to such conditions of sale, or other conditions, stipulations, and agreements, as they, the said commissioners, may think proper or deem expedient for the purpose of insuring the completion or carrying on of such public works by the purchaser or purchasers thereof, with a view to the public good or general benefit, or for any other purpose, notwithstanding such conditions of sale, or other conditions, stipulations, and agreements, may be considered prejudicial to such resale, or may not be beneficial to the persons, parties, bodies corporate, politic, or collegiate, or companies making such mortgage, assignment, or charge aforesaid, or otherwise interested in such public works, interest, property, and effects, in like manner, in all respects, as if such public works, interest, property, and effects were the absolute property of the said commissioners, or such persons, parties, bodies corporate, politic, * or collegiate, or companies as aforesaid, * 289 were in all respects foreclosed from all right or equity of redemption of or in respect of the premises so sold or disposed of."

These provisions have been argued upon as if they extended the power of sale given to the commissioners; but, upon examining them, it will be found that they have no such effect. The 20th section, which alone has any bearing upon the subject, refers, not to the property which is to be sold, but to the application of the proceeds of sales, when the sales have been made. So far as any inference is to be deduced from this section, it seems to me that the inference would be adverse to the view contended for on the part of the defendants, the railway company; for the claims, from which the property sold is to be discharged, are evidently the claims of persons who might have been foreclosed, not of prior mortgagees.

The true meaning of these Acts of Parliament seems to me to be this: that the commissioners shall have power to sell, as against all persons over whom they have an absolute priority; but that they have no power, under the Acts, to sell, as against persons who have priority over them. If prior mortgagees have conceded to them an absolute priority, they may sell, as against them; but, if an absolute priority has not been conceded, they can only sell subject to such priority as has not been conceded. They have no power to sell so as in any manner to affect priorities which have not been conceded to them.

In the present case, an absolute priority has not been conceded. The prior mortgagees have reserved their priority as to interest over the capital due to the commissioners, and I think the
* 290 commissioners had no power * to sell, so as to destroy the priority thus reserved. If the case had stood upon the mortgages alone, the commissioners could not, in my opinion, have sold under the Acts, otherwise than subject to the prior mortgages; and I think the agreement alters the case only to this extent, — that it enabled the commissioners to sell, subject only to the priority which was reserved by it. It was argued that the case ought to be considered as if the power of sale was introduced into the mortgage; but the mortgage and the agreement must be taken together, and the power of sale considered with reference to both the instruments; and if it be so considered, it would clearly be necessary that a qualification should be put upon it, that it should not be used so as to defeat the agreement. My opinion, therefore, agrees with that of the Vice-Chancellor upon this part of the case also. I think this ground of defence cannot be maintained.

The next ground of defence is founded on the Statute of Limitations, and involves two distinct questions: first, as to the principal; and, secondly, as to the interest. As to the principal, I think that the correspondence and the agreement furnish a sufficient answer. I think that the letter of the 24th of April, 1833, (a) amounted to a sufficient acknowledgment to bind the company, and that both the company and the commissioners having, as admitted by the answer, concurred in the agreement with the prior mortgagees, neither they, nor any person claiming under them, had, within the meaning of the statute, * any present * 291 right to receive their mortgage money whilst the income was insufficient to pay the interest of the commissioners, as it continued to be up to the period of the sale. As to the interest, I am also of opinion that the right is not barred by the statute. I think that the letter to which I have above referred was a sufficient acknowledgment within the 42d section of the statute, and that from the time of the entry of the commissioners, which was within six years from the date of that letter, the statute could not operate, the case falling within the proviso contained in the section. My opinion, therefore, is that this ground of defence also fails.

As to the fourth, and last, ground of defence, I think it sufficient to say that, whether the plaintiffs could have proceeded at law or not, they were, in my opinion, well entitled to come into equity upon the footing of the agreement.

Concurring as I do in the opinion of the Vice-Chancellor upon all these points, I have looked into the decree, which has been most carefully drawn, with a view to see whether it is open to any other objection. The only doubt which I have felt upon it has been upon the distinction taken in it between the harbour and the rates, tolls and receipts; but, looking to the language of the Acts, which were in force when the mortgage to the commissioners was made, and the agreement entered into, and to the language of the subsequent Act of 1 & 2 Will. 4, amounting, as it does, almost to a

(a) See the letter set out 2 Sm. & Giff. p. 57. It was an answer of the treasurer of the harbour company to a letter from Mr. Jortin complaining that no interest had been paid on the bonds, and it stated that no interest had been paid since 1821 to the government or to any one who held securities, nor was likely to be while matters remained as they were, but that the writer was at all times willing and happy to give Mr. Jortin, or any other gentleman who had embarked property in the undertaking, any information he required.

legislative declaration that the words, rates, tolls, and receipts did not include the whole income, I think the decree right in this respect also; and my opinion, therefore, is that this appeal must be dismissed, and dismissed with costs.

The Lord Justice KNIGHT BRUCE concurred.

BAINBRIGGE v. MOSS.

BAINBRIGGE v. MOSS.

1854. November 4, 6, 7, 8. 1855. January 25. Before the LORDS JUSTICES.
February 17. Before the LORD CHANCELLOR and LORDS JUSTICES.

After a long and unsuccessful litigation to recover an estate, a younger brother of the unsuccessful party, and the next to him in an entail claimed in the estate, entered into an agreement with him to pay what should be due in respect of the solicitor's bills of costs, with interest, on the principle of annual rests, and to commence a new litigation at his own risk in the name of the elder brother, who agreed, on these terms, to relinquish the estate to the younger brother. Shortly afterwards an agreement was entered into between the solicitor, who was also to conduct the new litigation, and the elder brother, that the solicitor should be paid in respect of the old costs a specified sum, being less than the costs out of pocket, unless the brothers or one of them came into possession of the estate, in which event the elder brother agreed that he or the younger brother would pay in respect of the old costs, another specified sum, being the full amount of the bills, with interest calculated on the principle of annual rests. The bills had not been taxed, but had been examined, though not minutely, by a friend of the client, who had been a solicitor. The new litigation was conducted by the solicitor with his own capital. It succeeded, and the brothers came into possession of the estate. Seven years after the agreement with the solicitor had been entered into, they sought to set it aside on the ground of undue influence and insufficient advice. *Held*, that the agreement ought to be upheld.¹

Before the new litigation was completely closed, but after a successful verdict in it, the younger brother, on the eve of making an antenuptial settlement, signed a memorandum of agreement between himself, the elder brother, and the solicitor, whereby the brothers charged the estate with payment

¹ See *Lyddon v. Moss*, 4 De G. & J. 104.

of all sums of money and bills of costs owing to the solicitor by both or either of the brothers, with lawful interest, on the principle of annual rests. At that time, the relation of solicitor and client, though not dissolved, had been loosened by differences between the solicitor and the brothers, and the influence arising from that relation did not subsist in its full force. The solicitor made no attempt to prevent the brothers from consulting other solicitors, and in fact the solicitor of the intended bride intervened, though not as the solicitor of the intended husband: *Held*, —

1. That the agreement was not usurious.¹
2. That it was not merely voluntary, and that whether the term as to annual rests could have been maintained or not,² the solicitor was entitled to abandon it, and enforce the rest of the agreement.³
3. That the former agreement, as to the old costs, was binding on the younger brother under the latter agreement.
4. That interest was payable on the old costs for the interval between the dates of the two agreements, as well as during the rest of the time.⁴

THESE were two appeals from a decree of the Master of the Rolls, made in three causes. One of the causes was a suit, instituted by a solicitor, to have effect given to a charge created by two of the defendants on * estates belonging to them, to secure * 293 the amount claimed to be due to the solicitor in respect of certain bills of costs. The other two were cross-suits by the defendants thus sought to be charged, seeking to set aside the charge and certain agreements by which its amount was regulated.

The following short statement of the circumstances out of which the litigation arose is transferred to this place from the prefatory part of the judgment of Lord Justice TURNER. The details are left in their place in the judgment.

A testator, named Thomas Bainbrigge, by his will, dated the 15th of August, 1815, devised his real estates, subject to certain charges thereon, upon trust for his illegitimate granddaughter Mary Ann Bainbrigge, for her life, with remainder to her issue in tail, with remainder in tail to Thomas Parker Bainbrigge, one of the defendants in the first, and the plaintiff in the second, of the above suits (who was the eldest son of the testator's eldest brother

¹ 2 Dan. Ch. Pr. (4th Eng. ed.) 1259 n. (6).

² See 2 Dan. Ch. Pr. (4th Am. ed.) 1259 & n. (6); Chitty Contr. (10th Am. ed.) 718-720 and in notes; *Savery v. King*, 5 H. L. Cas. 627.

³ 1 Story Eq. Jur. §§ 310-313.

⁴ See 2 Dan. Ch. Pr. (4th Am. ed.) 1380, 1381; *Stockbridge Iron Co. v. Cone Iron Works*, 102 Mass. 89, 90.

Joseph Bainbrigg), with remainder in tail to William Henry Bainbrigg, another defendant in the first, and the plaintiff in the third, of the above suits (another son of the said Joseph Bainbrigg), with remainders over; but it was alleged that the testator afterwards, by a codicil to his will, and also by a new will dated in the year 1818, altered the disposition of his estates, and after devising them to Mary Ann Bainbrigg and her issue in tail, as before, limited them in remainder to William Arnold Bainbrigg, a son of his illegitimate daughter in tail.

Thomas Bainbrigg, the testator, died in or about the year 1829, leaving his eldest brother Joseph Bainbrigg, the father of * 294 Thomas Parker Bainbrigg and William * Henry Bainbrigg, his heir. Upon the death of Thomas Bainbrigg, his will of 1818 was disputed by Thomas Parker Bainbrigg, acting in the name of his father Joseph Bainbrigg, the heir, and a long and expensive litigation ensued as to the validity of the will. This litigation commenced in the year 1829, and did not terminate until the month of February, 1835, when the will of 1818 was established against the heir. There were some proceedings connected with this litigation which were carried on down to a much later period, but these proceedings were of no great importance, and they were brought to a close in the month of June, 1841. At that date, at the latest, the litigation with Thomas Parker Bainbrigg, acting in the name of Joseph Bainbrigg the heir, as to the will of 1818, was brought to an end.

John Moss, the plaintiff in the first of the above suits, was a solicitor at Derby. In the early part of the litigation he was in partnership with Peter Bainbrigg Le Hunt, a cousin of Thomas Parker Bainbrigg, but this partnership was dissolved in the year 1833, the plaintiff John Moss, as it would appear, becoming entitled to the debts which were due to it. The plaintiff John Moss, and his partner Le Hunt, during the continuance of their partnership, acted as the solicitors of Thomas Parker Bainbrigg in the litigation, and, after the determination of the partnership, the plaintiff John Moss alone continued to act as the solicitor of Thomas Parker Bainbrigg until the litigation was closed.

The litigation hitherto referred to was between the devisees under the will of 1818 and the heir represented by Thomas Parker Bainbrigg, as to the validity of that will; but, in the year 1845, the limitations contained in both the wills, in favour of Mary Ann

Bainbrigge and her issue, came to an end by the death, without issue, * of her then only surviving child; and * 295 Thomas Parker Bainbrigge then became entitled in his own right, as tenant in tail under the will of 1815, to dispute the validity of the subsequent codicil and will. Thomas Parker Bainbrigge, however, was not at this time desirous of commencing further proceedings on his own account, but William Henry Bainbrigge, who was the next tenant in tail under the will of 1815, was anxious to commence such proceedings; and thereupon, and on the 21st of July, 1845, the following agreement was entered into between Thomas Parker Bainbrigge and William Henry Bainbrigge: —

“ The 21st day of July, 1845.

“ In consideration of my brother William Henry Bainbrigge undertaking, in the event of the Woodseat estate being recovered by him, or his receiving any compensation in lieu of the same, beyond his own costs, charges, and expenses, to bear and pay all such costs, charges, and expenses as I have incurred in reference to the estates of my late uncle Thomas Bainbrigge, Esq., deceased, together with interest after the rate of 5*l.* for each 100*l.* for a year, on the principle of yearly rests, on such costs, charges and expenses up to the present time, I agree to relinquish, release, and make over to the said William Henry Bainbrigge and his heirs, at his or their expense, by such assurance or assurances, and at such time or times as he or they shall require, all my right and title in and to the said estates, or any of them, under any will of the said Thomas Bainbrigge deceased, or as his heir-at-law.

“ T. P. BAINBRIGGE.”

“ In consideration of the above agreement, I undertake, in the event therein specified, to bear and pay all * such * 296 costs, charges, expenses, and interest as are therein mentioned.

W. H. BAINBRIGGE.”

At this time the drafts of the bills of costs of the plaintiff, John Moss, against Thomas Parker Bainbrigge, in respect of the previous litigation and summaries of accounts between them, had been made out and delivered to Le Hunt, at the request of Thomas Parker Bainbrigge. One of the questions in dispute was as to the conclusion to be drawn from the evidence connected with the

making out and delivery of these bills of costs and summaries of accounts; but, for the present, it is sufficient to state that they were delivered to Le Hunt on the 14th of July, 1845, and remained in his possession, at all events, until the 5th of August, 1845, when the bills of costs were returned to the plaintiff, John Moss, with a view to the then intended litigation (whether the other documents were then returned was in dispute between the parties); that they were made out upon the principle of charging compound interest on the bills of costs; and that they showed that the plaintiff, John Moss's, costs, charges, and disbursements in respect of the litigation and interest thereon, with annual rests, amounted to 10,005*l.* 4*s.* 2*d.*, and that the sum of 9370*l.* 3*s.* 5*d.* was due to the plaintiff, John Moss, upon the accounts as made out, after deducting his receipts.

After the delivery of these bills of costs and accounts, some communications (which are more particularly referred to in the judgment of Lord Justice TURNER) passed between the plaintiff John Moss and Le Hunt, and also between the plaintiff John Moss and Thomas Parker Bainbrigge, and ultimately, on the 18th of November, 1845, Thomas Parker Bainbrigge signed and
 * 297 gave * to the plaintiff John Moss the following memorandum: —

“Memorandum of an agreement made the 18th day of November, 1845, between Thomas Parker Bainbrigge, of Derby, Esq., for himself, his heirs, executors, and administrators, of the one part, and John Moss, of the same place, solicitor, for himself, his heirs, executors, and administrators, of the other part: —

“Whereas certain proceedings in equity and at law have heretofore taken place, in which questions have been raised as to whether Thomas Bainbrigge, Esq., deceased, the late uncle of the said Thomas Parker Bainbrigge, had duly made and executed, when of sound mind, a certain document bearing date the 17th day of June, 1818, alleged to be a codicil to a prior will of the said Thomas Bainbrigge, deceased; and also another document bearing date the 18th day of June, 1818, alleged to be a will of the said Thomas Bainbrigge, deceased, in which proceedings the said John Moss was employed as the solicitor and attorney of the said Thomas Parker Bainbrigge, who had an interest in setting aside the said alleged codicil and the said alleged will, and supporting a

prior will of the said Thomas Bainbrige, deceased; and the said Thomas Parker Bainbrige became and is now indebted to the said John Moss for certain costs, charges, and expenses, and money paid, laid down, and expended in reference to the said proceedings, which, with interest on the principle of annual rests, amounted, according to certain accounts delivered to the said Thomas Parker Bainbrige, and investigated and approved by him, to a balance or sum of 9377*l.* 3*s.* 5*d.*: And whereas the said John Moss, having great friendship and personal regard for the said Thomas Parker Bainbrige, hath consented to accept from the said Thomas Parker Bainbrige *the sum of 3500*l.*, in manner herein- * 298 after mentioned, in discharge of the said sum of 9377*l.* 3*s.* 5*d.*, subject to the contingency and agreement hereinafter contained: Now, the said John Moss doth hereby agree with the said Thomas Parker Bainbrige, that he, the said John Moss, will accept and receive from the said Thomas Parker Bainbrige the sum of 1500*l.*, paid by him to the said John Moss at the time of signing this agreement, and the further sum of 2000*l.*, to be secured to the said John Moss, with interest at the rate of 5*l.* for each 100*l.* for a year, by the promissory note of the said Thomas Parker Bainbrige, payable to the said John Moss or his order on demand, the said sums of 1500*l.* and 2000*l.* (amounting together to the sum of 3500*l.*), being, when the said sum of 2000*l.* and interest shall be wholly paid, but not otherwise, in full discharge of the said sum of 9377*l.* 3*s.* 5*d.*, except the said Thomas Parker Bainbrige, or his brother, William Henry Bainbrige, or their or one of their heirs or assigns, should come into possession, as tenant in tail or otherwise, of the estates of the said Thomas Bainbrige, deceased, or some part thereof, or obtain some compensation in lieu of the same, beyond the future costs, charges, and expenses of recovering the said estates, or some part thereof, or in obtaining the said compensation; but the said Thomas Parker Bainbrige agrees with the said John Moss, that if any such event should take place, the said Thomas Parker Bainbrige or the said William Henry Bainbrige, or their, or one of their, heirs or assigns, shall pay to the said John Moss, his executors, administrators, or assigns, the balance of the said sum of 9377*l.* 3*s.* 5*d.*, being the sum of 5877*l.* 3*s.* 5*d.*, or so much of the said last-mentioned sum as the value of the said estates, or the part thereof of which the said Thomas Parker Bainbrige or the said William Henry Bain-

* 299 brigge, or their, or * either of their, heirs or assigns, shall come into possession as tenant in tail, or otherwise, shall amount to, or as the compensation in lieu of the same, beyond the said future costs, charges, and expenses of recovering the said estates, or some part thereof, or in obtaining the said compensation shall amount to: and in case there should be any costs recoverable under any of the before-mentioned suits or proceedings, and not yet received, the said John Moss to have the full benefit thereof. As witness the hands of the parties.

“ THOMAS P. BAINBRIGGE.

JOHN MOSS.

“ Witness, JAMES W. GRIFFITH.”

In the mean time, and on the 8th of November, 1845, a bill was filed in this Court by William Henry Bainbrigg, in the name of Thomas Parker Bainbrigg, asserting the title under the will of 1815; and another and not less expensive litigation thus commenced. The plaintiff John Moss acted as the solicitor of William Henry Bainbrigg throughout this litigation also. During the progress of it, William Henry Bainbrigg, at the request of the plaintiff John Moss, wrote and sent to him the following letter: —

“ June 4, 1848, Liverpool.

“ My dear Moss, — Having for many years past employed you with the utmost confidence and satisfaction as my attorney and solicitor in various business transactions, and you having made advances of money to me for my use and benefit, I find that I am indebted to you in a considerable sum of money, on a balance of account on transactions commencing in the year 1838 and down to the present time, and it being inconvenient for me to discharge the sum, I wish you to receive this as my declaration
* 300 * that no advantage will be taken by me of the date of any of the matters or things contained in your account against me, and that I will not at any time avail myself of any plea of the Statute of Limitations or otherwise, to prevent your recovering the same moneys (if necessary); and that by your allowing me time I undertake to pay interest on the balances appearing against me from time to time, upon the principle of annual rests, until paid; and that you shall not in any way be damaged or prejudiced

by not having delivered any bills of costs to me; and you may consider this as a safeguard and protection against any of the formalities required by law in any wise relating to your bills of costs, or accounts, or otherwise.

“ Believe me, my dear Moss,

“ Yours sincerely,

“ John Moss, Esq., Derby.

W. H. BAINBRIGGE.”

The proceedings in this Court resulted in an action being directed to be brought to try the validity of the testamentary instruments. The action was accordingly brought by William Henry Bainbrigge, in the name of Thomas Parker Bainbrigge, and was tried at the Stafford Summer Assizes for the year 1850, when a verdict was returned for the plaintiff, thus establishing the title under the will of 1815. A new trial, however, was moved for and granted, and upon the second trial coming on, the parties came to a compromise upon the terms embodied in a memorandum, which was signed by the Attorney-General on the one part, and Sir FITZROY KELLY on the other, and by the agreement contained in which there was to be a verdict for the lessor of the plaintiff, Thomas Parker Bainbrigge (acting by William Henry Bainbrigge), subject to the following terms: “ Lessor of * plaintiff, in ejectment, to pay to the defendant 25,000*l.*, * 301 defendant undertaking effectually to convey the estate to lessor of plaintiff, discharged of incumbrances, thereupon created by or through him, and of the legacies under the will of 1818.” Then if any question arose in carrying the agreement into effect, it was to be referred to the Attorney-General and Sir FITZROY KELLY, and in case of difference between them to be referred to Mr. Turner, the conveyancer. “ As to the ultimate determination of all suits in equity and other proceedings, the same to be settled by the Attorney-General and Sir FITZROY KELLY, or the above Mr. Turner. Each party to pay his own costs at law and equity in all proceedings up to this day.”

William Henry Bainbrigge had, about this time, entered into a treaty of marriage with Miss Emma F. Yates; and the estates were proposed to be dealt with, for the purposes of the settlement, upon the marriage. In consequence of this proposal the plaintiff, John Moss, desired to have a charge upon the estates for the amount due to him in respect of the costs of both the litigations.

This claim, and other claims upon the estate, formed the subject of communication between the plaintiff, John Moss, and Thomas Parker Bainbrigge, William Henry Bainbrigge, and Mr. Lace, a solicitor at Liverpool, who was acting in the matter for the father of Miss Yates, the intended wife; and, ultimately on the 30th of May, 1851, Thomas Parker Bainbrigge and William Henry Bainbrigge signed the following memorandum:—

“ We, the undersigned, Thomas Parker Bainbrigge and William Henry Bainbrigge, do hereby respectively charge our respective interests in the Woodseat and Draycott estates, and all other the real estates which belonged to our late uncle, Thomas Bain-
 * 302 brigge, Esq., * deceased, with the payment to John Moss, of Derby, solicitor, of all sums of money, and bills of costs, charges, and expenses, owing to him by both or either of us, with lawful interest on the same respectively, upon the principle of annual rests, and we respectively agree with the said John Moss to execute all such good and sufficient disentailing, and other deeds and securities as may be necessary, and he may require, to effect a legal and proper mortgage (with all proper and usual clauses, provisions, and covenants) to him of the said estates for the said sums of money, bills, and interest; and we both, and especially Thomas Parker Bainbrigge, declare that this charge, and the said mortgage in favour of the said John Moss, shall have priority over any claims or claim which the said Thomas Parker Bainbrigge may have upon the said estate, or upon the said William Henry Bainbrigge in respect thereof. Dated the 30th day of May, 1851.

“ THOMAS PARKER BAINBRIGGE.

WILLIAM HENRY BAINBRIGGE.”

And on the same day William Henry Bainbrigge also signed a further memorandum as follows:—

“ I, the undersigned, William Henry Bainbrigge, do hereby charge my interest in the Woodseat and Draycott estates, and all other the real estates which belonged to my late uncle Thomas Bainbrigge, Esq., deceased, with the payment to my brother Thomas Parker Bainbrigge, Esq., of all sums of money and interest, owing to him by me. And I agree with the said Thomas Parker Bainbrigge to execute all such good and sufficient disentail-

ing and other deeds and securities as may be necessary, and he may require, to effect a legal and proper mortgage (with all proper and usual clauses, provisions, and covenants) to him of the said estates for the said sums of money and interest; but I declare that this * charge, and the said mortgage, in favour of * 303 the said Thomas Parker Bainbrigg, shall be subject and subsequent to any claims or claim which John Moss, of Derby, solicitor, may have upon the said estates, or upon both or either of us in respect thereof. Dated the 30th day of May, 1851.

“ W. H. BAINBRIGGE.”

These memorandums having been signed, the estates were put into settlement upon the marriage of William Henry Bainbrigg, by deed, dated the 4th of June, 1851, under which a power to charge the estates with 45,000*l.* was reserved to William Henry Bainbrigg.

William Henry Bainbrigg afterwards, on the 23d of March, 1853, obtained *ex parte* the common order to tax the plaintiff John Moss's bills of costs against him; but on the 15th of April, 1853, this order was discharged, and thereupon the plaintiff John Moss brought an action against Thomas Parker Bainbrigg, upon the agreement of November, 1845, and another action against William Henry Bainbrigg, for his bills of costs; and on the 18th of April, 1853, he also filed the bill in the first of these suits, whereby he prayed that an account might be taken of what was due and owing to him for interest on the said principal sum of 9377*l.* 3*s.* 5*d.* on the principle of annual rests, and that such interest, when ascertained, might be added to the said principal sum, and that it might be forthwith referred to one of the taxing masters of the Court, to tax the bills of costs of the plaintiff against the defendant William Henry Bainbrigg, delivered to him on the 6th day of August, 1852; and that in taxing such bills of costs, regard might be had to the aforesaid agreement of the 18th of November, 1845, the letter of the 4th of June, 1848, and the undertaking of the 30th of May, 1851, signed by him * and the defendant * 304 Thomas Parker Bainbrigg, and that an account might be taken of all advances of money made to or on account of William Henry Bainbrigg by the plaintiff, with lawful interest, on the principle of annual rests; and that it might be declared, by the decree of the Court, that under and by virtue of the undertaking

of the 30th of May, 1851, signed by him and the defendant Thomas Parker Bainbrigge, the plaintiff was entitled to stand as a mortgagee upon the real estates devised to or in trust for Thomas Parker Bainbrigge, and the heirs of his body, as thereinbefore mentioned, for the principal sum of 9377*l.* 3*s.* 5*d.*, and such interest as aforesaid, as a principal sum carrying interest, and for what should be found due and owing to the plaintiff on taxing his bills of costs as aforesaid, and on his said advances; and that such sum of money and interest might be declared to form together a second principal sum carrying interest, and that the defendants Thomas Parker Bainbrigge and William Henry Bainbrigge might be decreed, by a short day, to be appointed by the Court, to pay to the plaintiff the two principal sums and interest, and his costs of that suit, and that in default of such payment, they might be ordered to execute, or to cause or procure to be executed, a proper conveyance of the said estates to the plaintiff and his heirs, by way of mortgage, according to the undertaking of the 30th of May, 1851, in which all proper parties might join, for securing to the plaintiff, his executors, administrators, and assigns, the said principal sums and interest; and that the plaintiff might be declared, on such mortgage being made and executed, entitled to foreclose all equity of redemption in the said estates, and every part thereof, created or existing subsequent to the 30th of May, 1851; that the plaintiff might be declared entitled to redeem all mortgages and incum-

brances affecting the said estates prior to the mortgage,
* 305 which he was entitled to have made him as aforesaid; * and

that, for such purpose, all proper inquiries might be directed by the Court, to ascertain of what such prior mortgages and incumbrances consisted, and the persons entitled thereunto, and to ascertain the priorities of the said mortgages and incumbrances, the plaintiff thereby offering to redeem the same; that the defendants Thomas Parker Bainbrigge and William Henry Bainbrigge might jointly and severally be restrained by the order and injunction of the Court, from receiving or having paid to them, or to either of them, or for their or either of their use, the principal sum of 1500*l.*, and interest due and owing from the North Staffordshire Railway Company, or any part of such sum and interest, or of either of them; that a receiver of the rents and profits of the said estates might be forthwith appointed, and that Thomas Parker Bainbrigge and William Henry Bainbrigge, and the defendants

Samuel Henry Thompson, Thomas Parker Bainbrigge, and William Dixon, as the trustees of the deed of the 4th of June, 1851, might be forthwith restrained by the order and injunction of the Court, from receiving the said rents and profits, or any part thereof; that, if necessary, the said estates might be sold by and under the direction and decree of the Court, and that the proceeds of the said sale might be applied in discharging the mortgages and incumbrances upon the said estates, prior to the mortgage which the plaintiff was entitled to have made as aforesaid, and then in or towards the discharge of what should be found due and owing to the plaintiff on taking the said accounts, and taxing his said bills of costs as aforesaid.

Special petitions were afterwards presented by Thomas Parker Bainbrigge and William Henry Bainbrigge for the taxation of their bills of costs. The petition of Thomas Parker Bainbrigge was dismissed with costs, but * upon the petition of William * 306 Henry Bainbrigge the usual order for taxation was made, with a superadded direction to the taxing master to certify what was due on the 31st of May, 1851.

Thomas Parker Bainbrigge and William Henry Bainbrigge subsequently filed the bills in the second and third of these suits; the prayer of the bill filed by Thomas Parker Bainbrigge being, "that if and so far as may be necessary for the purpose of enabling the plaintiff to resist and defend himself and his interest in the said estates against the claims made by the said John Moss to any further or greater extent than he is entitled to have the same paid or repaid by the said William Henry Bainbrigge, or to any larger amount than the plaintiff has by his said answer submitted to pay, or this honorable Court shall be of opinion he ought to pay, the said memoranda and agreements signed by the plaintiff may be set aside wholly or in part as this honorable Court shall think fit; and that the said John Moss may be restrained by the order and injunction of this honorable Court from proceeding with the said action," and the bill filed by William Henry Bainbrigge having a similar prayer, that the agreement might be set aside, so far as was necessary for letting in his defence, both these bills being taken to be in the nature of cross-bills to the bill filed by Moss.

The causes were attached to the Court of the Master of the Rolls, and first came before his Honor on the 22d of November, 1853, upon exceptions to the answers of some of the defendants in the

first suit; and an order was then made by arrangement by which, after reciting all the proceedings, there was an inquiry directed to ascertain to what amount Moss the plaintiff was entitled to a charge on the estates under the memoranda in the pleadings * 307 * mentioned, or any or either of them, with liberty to use the affidavits on the inquiry; and then there was an inquiry directed what incumbrances there were affecting the estates, and who were entitled to the incumbrances, and what were their respective priorities.

A motion for a decree, and to vary the order of the 22d of November, 1853, was afterwards made before his Honor, and upon the hearing of this motion a decree was pronounced, directing in the first place that the bill in the first-mentioned cause should be dismissed against a railway company who were defendants; then it was ordered that the bill in the second-mentioned cause (which was Thomas Parker Bainbrigg's cause) should be dismissed; and then it was declared that the memorandum of the 30th of May, 1851, so far as it charged the interest of the defendant William Henry Bainbrigg in the estate in question, was to stand as a security, first, for the amount of the bill of costs of the plaintiff John Moss against the defendant William Henry Bainbrigg for business transacted by him on his retainer prior to the 30th of May, 1851, with interest at the rate of 4l. per cent per annum from the 30th of May, 1851; secondly, for all sums of money due from the defendant William Henry Bainbrigg to the plaintiff for advances made to him, with such interest as they respectively carried, according to the contract on which each advance was made; thirdly, for the amount due from the defendant Thomas Parker Bainbrigg to the plaintiff Moss on the delivery and taxation of the plaintiff Moss's bill of costs for business done by him for Thomas Parker Bainbrigg, and on his retainer, prior to the 21st of July, 1845. Then his Honor declared that the memorandum of the 30th of May, 1851, so far as it affected Thomas Parker Bainbrigg's interest in the estate, was to stand as a security, first, for 5877l. 3s. 5d., the balance due from * 308 Thomas * Parker Bainbrigg to the plaintiff on the footing of the memorandum of the 18th of November, 1845, with interest at the rate of 4l. per cent per annum from April, 1851; secondly, for the amount due on Thomas Parker Bainbrigg's promissory note for 2000l. and interest; and, thirdly, for the

amount, if any, due from Thomas Parker Bainbrigge to the plaintiff Moss for business done by him subsequently to the 18th of November, 1845, and prior to the 30th of May, 1851, with interest at the rate of 4l. per cent per annum from the 30th of May, 1851. Then accounts were ordered to be taken that the amount of Moss's bill against William Henry Bainbrigge for business transacted for him should be ascertained, and for that purpose the Master was to adopt the taxation directed by the order made on the special petition presented by William Henry Bainbrigge; and there was an account directed of other sums of money, an account of interest, and an account of what was due by Thomas Parker Bainbrigge for business done for him subsequently to the 18th of November, 1845.

The grounds upon which his Honor pronounced this decree will be found in his judgment, reported in the 18th volume of Mr. Beavan's Reports. (a)

Mr. Moss and Mr. Thomas Parker Bainbrigge appealed.

The Solicitor-General, Mr. R. Palmer, and Mr. E. Webster, for Mr. Moss.

Mr. Rolt and Mr. J. V. Prior, for Thomas Parker Bainbrigge.

* The following authorities were cited: *Gourley v. Wood*, (b) *Co. Litt.*; (c) *Hamilton v. Le Grange*, (d) *Ryder v. Mayor of Faversham*, (e) *Blackburn v. Warwick*, (g) *Tarleton v. Backhouse*. (h)

The Solicitor-General, in reply.

Judgment reserved.

1855. January 25.

THE LORD JUSTICE KNIGHT BRUCE. — Our decision of these causes has been delayed by the necessity of examining in a case of the

(a) Page 478.

(b) 3 Jo. & Lat. 678.

(c) 42 a.

(d) 2 H. Bl. 144; 4 T. R. 613.

(e) 5 De G., M. & G. 350.

(g) 2 Y. & C. 92.

(h) G. Coop. 231.

description of that before us with the utmost care and attention the whole of the evidence, but also by a doubt, to which I shall have occasion particularly to advert, not even yet removed from our minds, as to one portion of the dispute. With regard to all else we are satisfied.

The first question for consideration has been that of the validity in a Court of Equity of the agreement dated the 18th of November, 1845, as to which — assuming what is probably true, that the burden of supporting that agreement is on Mr. Moss, and that of impeaching it not on any other of the parties to the litigation — I think that the facts in evidence establish the validity of the contract equitably as well as legally, and entitle Mr. Moss to the benefit of it in the causes. It appears to me from the evidence to have been obtained by him not by means of misrepresentation, of suppression, or of fraud of any kind, not by means of any exercise of power, if there was power, not by means of exercising un-
 * 310 duly any influence, if there was * influence, nor in any sense unfairly. I am satisfied, considering especially the intervention of Mr. Bainbrigge Le Hunt in the matter, that Mr. Thomas Parker Bainbrigge signed it deliberately, when in possession of as much knowledge and with as much advice and assistance as it was necessary, according to the rules and principles affecting the relation of client and solicitor, that he should have in order to the complete validity, legally and equitably, of the transaction. My opinion, therefore, is that it would be doing less than justice to Mr. Moss to set aside the agreement, or treat it otherwise than as binding at law and binding here according to its tenor.

With respect to the agreements of 30th May, 1851, those two instruments must, I think, be taken, read, and construed together; though whether the Court ought for the purpose of construing them to have regard to the earlier agreements, or any one or more of them, is not, I apprehend, a material question. Upon the point, however, of valuable consideration, I was for some time not satisfied. But my opinion now is, that the contents of the two agreements of 1851, combined with the other facts proved, are sufficient to exclude both Mr. Thomas Parker Bainbrigge and Mr. William Henry Bainbrigge from any right to contend at law, that either of those two agreements was, as to any portion of its provisions, not founded on a valuable consideration. They must, therefore, I think, be treated as legally binding throughout, and for every pur-

pose, unless obnoxious wholly or in part to the usury laws, which in that year were in force, respecting securities on land. Upon which question, after some hesitation, I have come to the conclusion, that according to the true construction and effect of these two documents, the words, "with lawful interest on the same respectively, upon the principle of annual rests," contained in one of them, relate only to interest before and down to their *date, namely, 30th May, 1851, and that the two instru- *311
ments are in every point legally unobjectionable.

The question of their validity in equity is different. And as to this my impression is, that Mr. Thomas Parker Bainbrigge and his brother ought, from the evidence, to be inferred to have understood and been sufficiently advised concerning the nature and effect of each of the agreements of May, 1851, before either of them was signed; that it was an honest, a reasonable, and not an imprudent act on the part of Mr. William Henry Bainbrigge to sign both, and on his brother's part to sign one of them; that neither of the brothers was deceived, misled, unduly pressed, or unduly influenced, or otherwise than a perfectly free agent in the transaction, and that, as between them and Mr. Moss, both of the two agreements must be considered as equitably good, an observation, however, that I ought perhaps to qualify, so far as the "rests" are concerned; I mean the rests, for which in one of the two papers there is an express provision in Mr. Moss's favour. With regard to those rests I do not give an opinion, for Mr. Moss has by his counsel submitted and consented to waive his right (if any) to compound interest, not included in the 9877*l.* 3*s.* 5*d.* He is, however, entitled to simple interest at the rate of 5*l.* per cent per annum, on the 5877*l.* 3*s.* 5*d.*, from the 30th of May, 1851, if not from an earlier time, and to simple interest at 5 per cent per annum, on the debt due from Mr. William Henry Bainbrigge, calculated from the end of each year upon the amount of principal for the time being due. I understand Mr. Moss to be willing to undertake, and I accordingly consider him as undertaking, not to proceed at law against either of his two debtors, without the leave of the Court. This being so, I think that Mr. Moss may now be declared entitled to his costs of *both the cross-suits, *312
but the taxation should be delayed until the accounts shall have been taken, and the final hearing of the original cause.

It will have been observed, perhaps, that I have expressed no

opinion as to Mr. Moss's title or claim to simple interest on the 5877*l.* 3*s.* 5*d.*, for the whole or any part of the interval between the 18th of November, 1845, and the 30th of May, 1851. Of this point my learned brother and myself not having hitherto taken exactly the same view, we found an opportunity of mentioning it to the Lord Chancellor, who has at our request consented that it shall be argued separately before the full Court, and he has fixed for this purpose Wednesday next, when the minutes which we propose in all other respects, and which will presently be read, are either in their actual state, or, if altered now by us, as so altered, to be considered as settled, and the single point to be discussed will be that of interest for the limited period that I have just mentioned, on the footing of the correctness of these minutes, so far as they shall extend.

The Lord Justice TURNER, after stating the summary of the case above given, proceeded thus: The questions to be decided upon the appeals must mainly depend upon the validity and effect of the agreements of the 30th of May, 1851, but, in order to arrive at a just conclusion upon those points, it is, I think, necessary first to consider the agreements which had been previously entered into between the parties. Indeed, the appeals before us relate directly to some of these previous agreements.

The first of these agreements is dated the 21st of July, 1845.

[His Lordship read it.]

* 313 * There is no dispute between these parties upon the subject of this agreement, and it is unnecessary therefore to comment at any length upon it. It is important, however, to observe that it is sworn and not denied, that this agreement was arranged between Thomas Parker Bainbrigge and William Henry Bainbrigge, when the plaintiff, John Moss, was not present. I find in the affidavit of Mr. Moss this statement, of which I find (on that point), no denial whatever, "That I believe the terms of the agreement were finally arranged or agreed upon between the said Thomas Parker Bainbrigge and the said William Henry Bainbrigge themselves, at the house of the former, when I was not present, the latter of whom personally gave me instructions to prepare the said agreement." It is important also to observe that it is in this agreement that we first have any reference to the interest being computed upon the principle of annual rests, and

that the agreement affords strong evidence that it was then intended that in the event of the estate being recovered, Moss's costs, charges, and expenses should be paid in full, and paid with interest computed upon the principle of annual rests, for it can hardly be imputed to Thomas Parker Bainbrigge that he intended to make a profit out of the costs, by paying Moss the amount of the costs, and taking to himself the interest. It would, I think, be going too far to hold that this agreement shows that the costs to be paid were not to be taxed costs only, but the agreement proves to my mind conclusively that whatever might have been the previous arrangement as to costs out of pocket only being paid, and as to any further payment being left upon a mere honorary understanding, it was at this time intended by all parties, that in the event of the estates' being recovered, the costs were to be paid in full, and paid with interest computed upon the principle of annual rests.

* The next agreement is that of the 18th of November, * 314 1845, which is impeached directly by the bill filed by Thomas Parker Bainbrigge, and indirectly by the bill filed by William Henry Bainbrigge. This agreement is made between Thomas Parker Bainbrigge and Moss. I have already read it. The provisions of it are that Moss agrees to take 3500*l.* in satisfaction of 9300*l.* and odd which is stated upon the agreement to have been ascertained to have been then due to him from Thomas Parker Bainbrigge, subject to this proviso, that if the estate should be recovered the full amount of the bills of costs should be paid.

The broad grounds upon which this agreement is impeached are: that there had been no delivery and no examination of the bills of costs, and no settlement of the accounts; that the communications between the parties which led to the agreement had proceeded upon the footing that Thomas Parker Bainbrigge was to be repaid by William Henry Bainbrigge out of the estates, when recovered, whatever sum he might pay to Moss under the agreement; and that he was not advised by Moss that, by entering into the agreement, he might become liable to Moss beyond the amount which he could recover from William Henry Bainbrigge; and it is insisted that the agreement is at variance with the rules of the Court with reference to transactions between solicitors and their clients.

It is said that, some years before the year 1845, Moss, in conse-

quence of the litigation in which Thomas Parker Bainbrigge had been engaged having proved unsuccessful, had agreed to charge him only costs out of pocket, with simple interest thereon, but that he had delayed making out the accounts showing the sums he had paid out of pocket and the amount he was to receive,

* 315 on the * footing of the above arrangement; that a draft of the bills of costs only was sent to Le Hunt; that it was not sent to him till shortly before the 21st of July, 1845, and was then sent to him as the friend and relation of Thomas Parker Bainbrigge, for the purpose merely of ascertaining the amount of the items out of pocket, and the sum payable by Thomas Parker Bainbrigge to Moss in respect thereof, and upon an engagement that it should be returned to Moss when required, and that it was returned to him shortly after the 21st of July, 1845; that it was not examined, except by Le Hunt, for the purpose above mentioned; and that the sum of 3500*l.* mentioned in the agreement was in round numbers, the sum calculated as payable to Moss for his disbursements out of pocket, with simple interest.

The first issue here tendered is whether there had been, before the year 1845, an agreement by Moss to charge only the costs out of pocket, with simple interest upon them. There is much conflicting evidence on this issue. The existence of such an agreement is positively sworn to on the one side, and as positively denied on the other; but if it was necessary to decide the point, I think that, looking to the collateral circumstances, the conclusion at which I should arrive would be, that there was much discussion on the subject, much which might be understood by one party as amounting to an agreement, and by the other not, and that in the result there was no binding agreement upon the point. On the 18th of July, 1845, Le Hunt writes to Moss in these terms: "I have received your parcel containing the bills against Thomas Parker Bainbrigge. I have looked at the general accounts marked No. 1, No. 1*a*, and No. 1*b*, but to tell you the truth I do not understand them; they are not made out in the manner Mr. Bardonleau

showed me, and I must therefore get him to explain them,

* 316 for I * cannot tell which is the one on which my cousin will be expected to settle. I shall, of course, not part with any of the bills to any one, without your concurrence." Now that expression, "I cannot tell which is the one on which my cousin will be expected to settle," seems to me to be entirely inconsistent

with the notion that there had been at one time, anterior to the date of 1845, a binding agreement by Moss to take the amount of the bills of costs, with simple interest only.

And again, on the 6th of August, 1845, Mr. Le Hunt writes to Moss in these terms: "My dear Moss, — As I am expecting my cousin, Tom Bainbrigge, here on Friday, I will send back the bills by him; I have not looked over the items, nor can I pretend to do so, nor indeed have I looked much at the general statements, as I do not fully understand them without a little explanation, but it seems that Mr. Bardonleau has charged compound interest on all the accounts, which, in my opinion, should not be done, and may make a good deal of difference. I will endeavour to see you to-morrow if not much engaged. It appears to me that simple interest should be taken for the amount of payments for each year as they successively follow. Of course you know nothing of the matter." There, again, it is scarcely possible to believe that if Mr. Le Hunt at that time, on the 6th of August, 1845, considered that there had been a binding agreement by Moss to take the costs out of pocket with simple interest upon them, he should have expressed himself in such terms as these: "Mr. Bardonleau has charged compound interest, which, in my opinion, should not be done, and may make a good deal of difference," or should have said, "It appears to me that simple interest should be taken for the amount of payments for each year."

* I think it in the highest degree improbable that he * 317 could have written these letters without referring to the agreement alleged in the affidavits on the part of Thomas Parker Bainbrigge, if he, Mr. Le Hunt, had considered that agreement to be binding and in force. It seems to me, however, that it is not necessary to determine this issue, that the issue is important only with reference to the view in which Le Hunt may have looked at the bills of costs, and that, so far as the questions before us can be affected by Le Hunt's conduct, what is to be considered is, to what extent he did in fact look at the bills of costs, and not what were the considerations which induced him to examine them.

We come then to the second issue here tendered, whether Le Hunt did in fact examine the bills of costs and accounts for the purpose merely of ascertaining the amount of items out of pocket, and the sum payable by Thomas Parker Bainbrigge in respect thereof. In order to determine this point it is necessary to look

back to what had passed before the bills were delivered to Le Hunt. It appears that these bills were begun to be made out in the month of May, 1843; that Thomas Parker Bainbrigge was urgent for the completion of them, and that in consequence of this urgency Moss wrote to Le Hunt on the 4th of November, 1844, a letter in which, after referring to his clerk, Bardonleau, having informed him that the accounts were ready for him to look over, and answer several inquiries which Bardonleau thought necessary, Moss expressed himself as follows: "I have, therefore, determined to turn the matter over entirely to you" (that is to Le Hunt) "and him" (Bardonleau), "if you will be good enough to fix a time, after the middle of next week, when you can sit down with him to

* 318 the matter, which I should think would * occupy you at least some days even to look over, if you are to see that every item is extracted from my books and agents' bills." Then he states the circumstances attending the litigation, and says, "I recur to these circumstances that in your going through the accounts (in which you will sometimes probably have to revert to the papers), you may be able to justify the proceedings I was called upon to adopt (principally defensively), and to explain the costs you will find, though as to their amount I at present know no more than you do, as I wish them to be ascertained on certain principles, and not to be affected by their amount, and wherever it should be a question of whether a certain charge should be made or not, I should wish the utmost liberality to be shown to your cousin." Now that letter bore date the 4th of November, 1844; I then find it stated in the affidavit of Mr. Moss that, after the date of that letter, there had been an appointment made for Le Hunt meeting Bardonleau on the subject of these bills of the 21st of November. He says this: "I am informed and believe that, although Mr. Le Hunt did not attend Mr. Bardonleau on the 21st of November, 1844, the said Mr. Le Hunt did in fact attend him at my offices on the 26th of November, 1844, and on the two succeeding days, when they were engaged the whole of the first and second days, and upwards of two hours of the third day, in investigating my bills of costs and accounts." And then he states the entries made by Mr. Bardonleau in his books of attendances upon Mr. Le Hunt on those days. Then, he says: "I have been informed by Mr. Bardonleau and believe that, on the last three aforesaid occasions of the said Mr. Le Hunt attending upon the

said Mr. Bardonleau, the said Mr. Le Hunt minutely examined the said bills of costs, for the purpose of seeing the charges for business done by me, and that the moneys * charged by me * 319 as having been paid out of pocket respectively were correctly charged, but upon such examination and inspection there were certain blanks in the accounts which required further examination." To this statement I find no denial. What Le Hunt says in his affidavit upon the subject is this, "I have read the affidavit of John Moss, sworn in this matter on the 13th of June. I adhere to the statements contained in my former affidavit, namely, that I examined the bills of costs solely for the purpose of seeing that the sums paid by the said John Moss out of pocket were duly extracted and entered in the said bills. As Mr. Moss had agreed to charge only money out of pocket, my attention was directed to that point, for although charges for time and work done were made, I did not trouble myself about those charges, for as my cousin would not have to pay them it was of no importance whether a charge for an attendance was 20s., where it ought only to have been 6s. 8d., or six guineas for a journey where only two should be charged. The whole amount of the bills or any one of them appeared quite immaterial." Then he says: "I say that Bardonleau was never employed under my directions in making out the bills and accounts, but was so employed under the direction of the said John Moss; that I never gave Mr. Bardonleau any instructions upon the subject, except that I requested him to make haste over them and get them finished, and I never approved the accuracy thereof, or the moderation of the charges in the said bills for the reasons hereinbefore given; that my cousin was not concerned in the question, whether the charges were moderate or otherwise." But that he attended on these three days in November, and went through these bills of costs with Bardonleau, is nowhere denied on the part of Mr. Le Hunt that I can find.

* It is, I think, therefore clear that long before the bills * 320 had been delivered to Le Hunt, they had been looked into by him at the office of Moss, and this is confirmed by Le Hunt's letter of the 13th of November, 1845, in which he expresses himself in these terms: "In reply, then, I have only to say, that, having looked at the bills at Mr. Moss's office, two years since, I did not think it necessary to go over them again when I had them sent to me in the summer." The bills of costs, with three summaries

and accounts, showing the interest and balances due from Thomas Parker Bainbrige, were sent to Le Hunt, on or about the 14th of July, 1845, with a letter from Moss of that date, which contains these passages, — Mr. Moss to Mr. Le Hunt: “ A short time since I received from Mr. Bardonleau the result of his labours upon the bills and accounts of your cousin, with a letter on the subject. I have detained them until now in the hope that I could have had the opportunity to look through them, but I see no prospect, consistently with other engagements, of looking at them, with any degree of attention, and as you are pretty well master of the subject-matter of them, I prefer sending the papers as I have received them, feeling assured that you will pay the requisite attention to them, to satisfy your cousin that there are no improper charges against him, as I am more anxious about this than afraid of a few charges, which ought to appear, being omitted. Of course you will consider that in intrusting to you the only drafts I have of the bills, I do so only for the purpose of examination, and on the faith of your returning them to me when required, and without prejudice in any respect to myself, as not only has the labour of putting together been immense, and I have sacrificed the time of my late clerk to a very great extent when he should have been attending to other matters of great importance to me, but

* 321 I have no doubt that if I were to go * over them with care,

I should find many charges and even sums out of pocket, which a stranger would not discover, but my recollection might supply. However, it has been and still is my desire to act with liberality to your cousin, even beyond any thing he could expect from me, but when he once offered 500*l.* to cover what was due to me, I felt it was absolutely necessary to have the bills and accounts so made out, that no misconception should arise as to what was right and liberal on my part to receive.” Then in the latter part of the same letter, he specially invites Mr. Le Hunt’s attention to these bills in these terms: “ Not having paid personal attention to the details, and you having been good enough to do so, I leave in your hands the looking them over with an unprejudiced eye with this request, that wherever there shall be a question on your own mind whether the sum to any item in the bills should remain or not, that it may be deducted, and I hope that notwithstanding the heavy losses which I have had to bear through the overwhelming nature of the business, you will consider that I am

still anxious to act in the most liberal manner regarding professional remuneration, as not to be compared with the kindly feeling with which I have acted and still wish to act." That therefore was the purpose for which these bills were sent to Mr. Le Hunt as expressed in Mr. Moss's letter, accompanying the bills, inviting him distinctly to examine the bills.

The bills remained with Le Hunt until after the 5th of August following, when they were returned to Moss, being required by him for the purposes of the then intended litigation. On the 6th of August, 1845, Le Hunt writes to Moss,—it is in the letter to which I have before referred,—saying that he had not looked over the items of the bills, but that it seemed that Mr. Bardonleau had charged compound interest on the accounts, whereas * it seemed to him that simple interest only should be * 322 charged. That letter was answered by Moss on the 8th of August, urging the justice of the compound interest being allowed. And on the 18th of August, 1845, Thomas Parker Bainbrigge called upon and left with Moss the following proposals:—

"To pay Moss 3500*l.* in round numbers, that is to say, 1500*l.* within two months from the final settlement, and to give him a note of hand for 2000*l.* at 5*l.* per cent (with permission to pay off any part of the principal when convenient), and to consider Moss entitled to the balance, without further interest remaining out of the 10,000*l.*, being compound interest of the whole bill after deducting the above 3500*l.* and 1228*l.* with compound interest thereon, from the time of payment, being the amount already paid, if he should succeed in obtaining the Woodseat estates, or gaining any compromise. The whole bill of 10,000*l.* to be first paid out of the estate or from any such compromise as shall be made to Mr. Moss and Mr. Bainbrigge, in equal proportions on their respective shares of such compensation."

That, therefore, is a proposal on the part of Thomas Parker Bainbrigge, to pay 3500*l.* at once, and that the remainder should be paid in the event of the estates being recovered and paid with compound interest. Le Hunt says that he was not consulted on this proposal; but he was present when it was made; the bills of costs had been seen by him in Moss's office before they were delivered; they had been delivered to him for the purposes of examina-

tion ; and whether he had gone through them or not when they had been delivered, I think the only fair inference to be deduced from his letter of the 6th of August, and from his silence on the 18th of August, is that he knew them not to be open to any serious objection.

* 323 * Beyond all this, I find the following statement in the affidavit of Sadler of the 21st of July, 1858, to which I find no contradiction whatever : “ I believe it to be untrue, as sworn by the said Mr. Le Hunt in the 7th paragraph of his said affidavit of the 14th of May, 1858, and repeated in effect in the 14th paragraph of his said affidavit of the 23d June, 1858, that the said Peter Bainbrigge Le Hunt examined the bills of costs of the said John Moss solely for the purpose of seeing that the sums paid by the said John Moss were duly extracted and entered in the said bills. My reasons for such belief are that the said bills of costs are made out with items in three columns or ranks of figures,—one containing the full professional charges, another containing agents’ charges, counsels’ fees, disbursements, and expenses, and the third containing actual payments only,—and, since the last-mentioned affidavit was sworn, I have again carefully examined the said bills of costs, and find that they contain numerous figures which I believe to be in the handwriting of the said Peter Bainbrigge Le Hunt, showing, where they exist, his having extracted, and added up, as well figures representing the full professional charges, as figures representing the agents’ charges, counsels’ fees, disbursements, and expenses, and the actual payments only ; and I also find that the figures, which I believe to be those of the said Peter Bainbrigge Le Hunt, upon the said bills of costs that apply to money expended, where they differ (as they do in some instances) from those of Mr. Bardonleau in the extracting or adding up, correspond, so far as they exist, with the figures carried out by the said Peter Bainbrigge Le Hunt in the exhibit marked No. 1 to his said last-mentioned affidavit.” So that here is an affidavit, not contradicted, distinctly stating that there were, upon these bills of costs, figures by Le Hunt, referring to the full professional charges, and not merely to the charges out of pocket.

* 324 * The result appears from these passages to have been that there had been probably not a full examination of these bills of costs by Mr. Le Hunt, but a partial examination of them at least.

The remaining issue here tendered is that the 3500*l.*, mentioned in the agreement, was, in round numbers, the amount of the disbursements, with simple interest upon them; and, with a view to this point, some calculations made by Le Hunt are referred to in his affidavit of the 23d of June, 1853. But I do not find, either in this affidavit or in his previous affidavit, that Le Hunt states that any result was founded on these calculations; and it is evident, from the affidavit in reply, that these calculations were founded upon an erroneous basis. This attempt to refer the 3500*l.* to the disbursements and interest is further met by a statement in Moss's affidavit of the 13th of June, 1853, to which I find no contradiction. It appears that bills of costs were sent to Le Hunt on the 14th of July, and remained in the possession of Le Hunt until some time after the 5th of August, 1845, and that Thomas Parker Bainbrigge, who resided within thirteen miles, or thereabouts, from Le Hunt, and was in frequent personal and written communication with him, had ready access to the bills of costs, summaries, and accounts, and might have made himself acquainted with them. The passage to which I refer as uncontradicted is this: "And being so informed of his liabilities as aforesaid, I believe he, some time after the signature of the agreement of the 21st day of July, 1845, in the said petition mentioned, called upon me, and, in reference to my said bills of costs and accounts, stated that, even if he had the means of paying me in full, he should be unwilling to pay so large a sum for interest, especially as compound interest had been charged, but that he could not in other respects find any fault with my bills of costs or * accounts, admitting * 325 that the former had been investigated on his behalf by the said Peter Bainbrigge Le Hunt, but the said Thomas Parker Bainbrigge added that it was not only out of his power to pay the 10,000*l.*, — thereby meaning the amount due to me on my said accounts, — but that, if I required him to pay only the amount which I had expended out of pocket, with interest, he should be a ruined man, and have nothing left for himself and his wife in their old age, and on my asking him how much and in what manner he proposed to pay me, he said he could not pay me more than 3500*l.*, by 1500*l.* in cash, and giving me his promissory note for 2000*l.* more, when, after some further conversation, and the said Thomas Parker Bainbrigge assuring me on his honour that he was making to me a true representation of his affairs, I stated to him that it

should never be said he had been ruined by paying me, and I would accept his own offer rather than he should be ruined, subject, however, to the condition, that if the said Thomas Parker Bainbrigge or the said William Henry Bainbrigge, or any other member of their family, should come into the possession of the estates of the said Thomas Bainbrigge deceased, or some part thereof, or obtain some compensation in lieu of the same, beyond the future costs, I should be first entitled to the whole amount due to me from the said Thomas Parker Bainbrigge, to the extent of what might be so recovered or obtained, to which condition the said Thomas Parker Bainbrigge at that time readily assented, expressing much gratitude to me for my generosity and kindness, and promising forthwith to raise and pay the sum of 1500*l.* to carry out the first part of such arrangement."

That, therefore, distinctly refers to the amount of 3500*l.* as having been settled, not according to Mr. Le Hunt's mode
 * 326 of stating it, upon the calculation made * by him of the costs out of pocket and simple interest upon them, but distinctly on the conversation not denied to have passed between Moss and Thomas Parker Bainbrigge, in which Thomas Parker Bainbrigge stated that 3500*l.* was the utmost he could pay, that he should be ruined if called on to pay the full amount, and Moss saying he would not press him to that extent, but would accept 3500*l.* with the superadded condition, that if the estates should be recovered, the whole bill of costs should be paid in full. Upon the result of this evidence I feel no doubt that these bills of costs, though not, perhaps, minutely gone through by Le Hunt, had been so far examined by him as to show that it was fair and reasonable that they should not be disputed on the part of Thomas Parker Bainbrigge.

If, therefore, this agreement can be impeached by Thomas Parker Bainbrigge, it must be, not upon the facts of the case, but upon the ground that the relation subsisting between him and Moss destroys the validity of the agreement. It is said that Moss was bound to advise Thomas Parker Bainbrigge that he might, under the agreement, be compelled to pay more than he could recover from William Henry Bainbrigge, and that so far from giving this advice he told him the contrary, and that whatever he paid he would have to receive from the estates. I very much think that this statement was well founded. William Henry Bainbrigge had

agreed to pay Thomas Parker Bainbrigge all his costs, charges, and expenses, with the compound interest upon them. He seems to me to have left Thomas Parker Bainbrigge at full liberty to settle with Moss the amount of those costs, charges, and expenses; and I do not see what right he could have to insist upon Thomas Parker Bainbrigge taxing the bills if he did not think fit to tax them, at all events, without tendering an indemnity to Thomas Parker * Bainbrigge against the consequences of the taxation. • 327 Still less do I see how he could be entitled to take the estates out of Thomas Parker Bainbrigge without recouping him any sum which he might have paid upon a fair and *bond fide* settlement of the bills.

With respect to the general rule of the Court as to transactions between solicitors and their clients, this case does not appear to me to fall within the rule. The business in respect of which these costs were incurred, had terminated in the year 1841, and there is nothing to show that after that period Moss acted as the solicitor of Thomas Parker Bainbrigge. It would appear that for some years the relation of solicitor and client had ceased to exist between the parties. Thomas Parker Bainbrigge had placed himself, as to these bills of costs, in the hands of Le Hunt. Le Hunt had been present when the proposals of the 18th of August were made, and whether he had or had not been consulted by Thomas Parker Bainbrigge, as to the final arrangement in November of that year, Moss had certainly every reason to believe that he had been so consulted.

This part of the case, however, does not rest here. If this agreement was at any time open to question, can it now be impeached? What has been the conduct of Thomas Parker Bainbrigge? He has permitted the new litigation to be entered upon and continued by Moss, in his name, down to the year 1851, when it was brought to a successful termination. If this agreement had not been entered into, he might and probably would have been sued for these costs, and Moss might and probably would have declined to carry on the new litigation. Is he to be permitted to take to himself the benefit of this exemption from liability, and the advantage which, under the agreement of July, 1845, has * resulted to him from the estate having been recovered, • 328 and at the same time to repudiate the terms by which he has obtained those advantages? If he had at any time any equity.

to be relieved against this agreement, I think he has by his conduct raised a counter equity against himself, and upon the whole I feel no doubt that the agreement of November, 1845, is binding upon him.

This agreement of November, 1845, being binding upon Thomas Parker Bainbrigge, the 5877*l.* 3*s.* 5*d.* mentioned in it became a debt due from him, and having regard to the terms of the memorandum of May, 1851, it may not be material to consider the question how far William Henry Bainbrigge could in any event have been permitted to question the amount of that debt, or to insist upon the taxation of the bill with a view to the reduction of it. The agreements of May, 1851, are not, as I read them, agreements by which each of the Bainbrigges charges his interest in the estates with the amount due from himself only, but agreements by which each of them charges his interest in the estates with the amount due from himself and from his brother. The words of the agreement are, "all sums of money owing to Moss by both or either of us," and these words occur not only in the memorandum signed by both the brothers, but in the memorandum signed by William Henry Bainbrigge only. Whatever moneys, therefore, were due from Thomas Parker Bainbrigge to Moss became, as I understand these agreements, a charge upon the interest of William Henry Bainbrigge in the estates, as well as upon Thomas Parker Bainbrigge's interest in them. And accordingly the 9377*l.* 8*s.* 3*d.* mentioned in the memorandum of the 18th of November, 1845, became charged upon William Henry Bainbrigge's interest on the estates. That this was the true meaning of the agree-

* 329 ment is, I think, more evident from the declaration * as to the priority of Moss's charge. Why did William Henry Bainbrigge join in that declaration, if it was not intended that his interest in the estates should be charged with the debt due from Thomas Parker Bainbrigge to Moss? If, however, it was necessary to enter into the question as to the right of William Henry Bainbrigge to dispute the amount of the debt due from Thomas Parker Bainbrigge, I am very strongly inclined to think that William Henry Bainbrigge could not, under the circumstances of this case, have been permitted to call for the taxation of the bills. His affidavits as to his knowledge of Moss's claims against Thomas Parker Bainbrigge, and of the agreement of November, 1845, are most guardedly framed. He swears that he did not know of the

extent of his brother's liability, or that Moss had a legal claim upon him for 10,000*l.*, but I do not find that he ventures to swear that he did not know that Moss claimed nearly 10,000*l.* against his brother. He says that he did not know of the agreement of November, 1845, until long afterwards, but he nowhere states when first he knew of it. Looking to the language of these affidavits and to the evidence on the part of Moss, I think it must be imputed to William Henry Bainbrigg that he knew of the extent of Moss's claim against Thomas Parker Bainbrigg from the commencement of the proceedings, with reference to the second litigation, and it is clear upon the evidence that he knew of the agreement of November, 1845, at least as early as the month of June, 1846. In this state of circumstances, and the new litigation having been carried on for his benefit, he surely ought to be precluded in equity, no less than his brother, from questioning the debt secured by that agreement.

The agreement next in order is that contained in the letter of the 4th of June, 1848, from William Henry Bainbrigg to Moss, by which agreement William * Henry Bainbrigg * 330 agrees to pay the bills of costs upon the principle of an annual settlement of the bills with interest upon them, that is, his own bills of costs.

If this letter had stood by itself, I should have considered it as entitled to little, if any weight; but I consider it to be important, when looked at with reference to what had passed before, and what followed afterwards. I construe it as an agreement by William Henry Bainbrigg to pay compound interest upon the balances which should appear against him on the bills of costs and accounts; and I think it material with reference to what had passed, as affording strong evidence that he was not at this time dissenting from Thomas Parker Bainbrigg's costs being paid upon the same principle, under the agreement of November, 1845, with which he was at that time acquainted; and, as to what afterwards followed, I think it more material, as conveying to William Henry Bainbrigg full knowledge of the terms upon which Moss considered that he was to carry on the then pending litigation.

The next and final agreements between these parties are the agreements of the 30th of May, 1851. Those agreements are in these terms: [His Lordship read them as set out above.]

It was objected to the first of these agreements that it was void,

upon the ground of usury, and it would clearly be so, if it was intended to secure compound interest upon the balance due at the date of the agreement; but I do not think that this is the true meaning of the agreement. The agreement charges the estates with the payment to Moss of all sums of money and bills of costs, due to him from the Bainbrigges, or either of them, with

* 331 lawful interest on the same respectively, on the principle * of annual rests. The latter words, "with lawful interest on the same respectively, on the principle of annual rests," may either mean that the interest, to be computed on the principle of annual rests, is to form part of the sum to be charged on the estates, or that the sum to be charged on the estates is to carry interest upon the principle which is mentioned. I think that the first of these meanings is the true one, for it had been before agreed, that these sums of money and bills of costs should carry interest upon the principle of annual rests; but unless this construction be adopted, the estates would not be charged for the time past with any interest upon them. Besides, if the interest was not intended to be part of the capital sum to be charged on the estates, it is most improbable that the provision respecting it should be found in this part of the agreement, which is evidently intended to define the amount to be charged; and, again, the mortgage to be effected, is to be "a legal and proper mortgage;" but no mortgage could be legal or proper by which interest, to be computed upon the principle of annual rests, was reserved. I think, too, that the authorities mentioned by *Mr. Webster* have an important bearing upon this question; and upon the whole, therefore, my opinion is, that the objection, upon the ground of usury, cannot be maintained.

These agreements were then further objected to, upon the ground of the relation of solicitor and client having subsisted between the parties at the time when they were entered into. How this question would have stood, if the compound interest had been insisted upon, it is not material for us to consider, it being in the power of the Court, when called upon to enforce the agreement, to modify its provisions; and the counsel for Moss having waived all claim to the compound interest, the simple question is, whether,

* 332 under the circumstances of this * case, an agreement to charge the estates with interest upon the taxed amount of the bills of costs, as if annually settled, can or cannot be main-

tained. I am of opinion that, under the very special and peculiar circumstances of this case, the agreement ought to be upheld. It is true, that, when the agreements were entered into, the relation of solicitor and client subsisted between the parties; but it subsisted only in a modified degree. There had been an unpleasant correspondence, and an altercation between the parties, before these agreements were entered into. It is sworn by Mr. Moss, that before he went to Liverpool, where the communications as to these agreements took place (and there is no denial of it), there had been an angry or unpleasant correspondence between the parties; and it also appears there was an altercation between them at the first meeting on the subject of the settlement of the transactions with Moss.

The relation of solicitor and client, though not terminated, had been loosened. The influence consequent upon that relation was not subsisting in its full and perfect force. It appears, indeed, that before this time William Henry Bainbrigge had employed other solicitors. That is a fact also sworn to in Moss's affidavit, and not contradicted. Again, these agreements were not signed by either of the parties in the presence or under the personal control of Moss. No attempt was made to prevent either of them from consulting any other solicitor upon the subject. They had full power and full opportunity of doing so. Indeed, Mr. Lace, a solicitor of great experience, although from his affidavit I am bound to conclude that he did not interfere in this part of the business, was present when the terms of the agreements were arranged, and Moss, at least, had every reason to believe that William Henry Bainbrigge was under his protection. Further, the long and perilous * litigation from which the costs in question * 333 for the most part arose, had been carried on mainly at the expense of Moss and by means of his capital. It had been so carried on with full knowledge on the part of William Henry Bainbrigge of the terms on which Moss considered that he was conducting it. It had been brought to a successful termination, and William Henry Bainbrigge, in his letter of the 30th of May, 1851, expresses himself in these terms: "Your letter came this morning, and I now return you the two agreements. I have seen Mr. Lace, and he approves of the draft," that is, the draft of the settlement, "and says it is very nicely drawn, so now I hope you will lose no time in sending the deed engrossed by Monday. You

must pardon me entering into the other parts of your letter now. I cannot do it either with justice to you or me ; all I can say is, I never altered my feelings towards you in the slightest degree, but, on the contrary, should never have said a word, had not you seemed disposed to think that I did not wish you to be paid as a friend," intimating that he wished payment to be made to Mr. Moss on that footing. Looking at the whole of the evidence in this case, I think that he had good reason for so regarding him, and that the justice of the case requires that these agreements should be upheld. If the settled rules of this Court had prevented us from upholding them, I should have regretted it, but I am satisfied that, watching as we are bound to do the proceedings between solicitors and their clients with the utmost jealousy, we are, nevertheless, fully justified, by the circumstances to which I have referred, in giving effect to these agreements in the modified manner in which it has been asked.

Upon looking through the arguments which were addressed to us on the part of the respondents (the Bainbrigges), I think • 334 that the observations which I have * made furnish a sufficient answer to most of those arguments. One or two points, however, were strongly urged on their part, upon which a few words may, perhaps, be usefully added. Great reliance was placed on the part of William Henry Bainbriggs, on the fact that, before these agreements were signed, he objected to any specific sum being inserted in them as the amount of the costs of the first litigation, and refused to adopt the memorandum of the 18th of November, 1845. I take this to go no further than to show that he did not intend to be bound by that memorandum further than he was already bound by it. It does not seem to me to affect the question to what extent he was already bound by it, and in my opinion it was already binding upon him. It was further attempted to be argued that the Bainbrigges did not understand that the words upon the principle of annual rests denoted compound interest, but of this there can be no doubt. Le Hunt's letter of the 6th August, 1845, and Thomas Parker Bainbriggs's proposal of the 18th of August, 1845, seem to me to set that question at rest.

It was also said that these agreements were not intended to charge the estates with interest on any of the bills of costs until delivered, but the agreement is to make a mortgage with all usual

clauses, provisions, and covenants, and the mortgage would of course carry interest, and it is to be for the same sum for which the charge is created. I think, therefore, the interest must run from the date of the charge.

There is, however, a further point upon the question of interest, viz., the interest upon the 5377*l.* 13*s.* 4*d.* from the date of the agreement of 1845 up to the date of the agreement of 1851, on which we are desirous of having the Lord Chancellor's assistance, and I abstain, * therefore, from giving any * 335 opinion upon it. Subject to any alteration which may follow upon the opinion of the Court upon that point, the decree, in our opinion, must be this: —

Whereas, upon opening the cause, Mr. Moss, by his counsel, waived and relinquished his right, if any, to charge or be allowed compound interest, under or by virtue of the several instruments in the pleadings mentioned, or any or either of them (save only such compound interest as was included in and formed part of the sum of 9377*l.* 3*s.* 5*d.* in the pleadings mentioned); and John Moss also undertook not to proceed at law against the defendants Thomas Parker Bainbrigg and William Henry Bainbrigg, or either of them, under or in respect of such instruments, or any or either of them, without the leave of the Court. Now upon hearing, &c., this Court doth order that the decree of the 12th day of June, 1854, be varied, and as varied be as follows: —

First. Dismiss the bill in the first-mentioned cause as against the defendants, the Staffordshire, Derbyshire, and Worcestershire Railway Company; that will be as it stood.

Then declare that Thomas Parker Bainbrigg was before and upon the 30th May, 1851, and now is bound by the agreement of the 18th of November, 1845, in the pleadings mentioned; and that the sum of 5877*l.* 3*s.* 5*d.* in the same agreement, and in the pleadings of these causes mentioned, became and was before the 30th of May, 1851, justly due from Thomas Parker Bainbrigg to the plaintiff, John Moss, under or by virtue of the same agreement, and that the said sum of 5877*l.* 3*s.* 5*d.* is not liable to be reduced by taxation.

* Upon that will follow the direction whether there is to * 336 be interest or not on the 5877*l.*, according as the decision of the Court may be.

Then declare that Thomas Parker Bainbrigge was from the time of making and giving the promissory note for 2000*l.* in the pleadings mentioned bound also thereby; and that the said sum of 2000*l.* is not liable to be reduced by taxation.

Declare that Thomas Parker Bainbrigge and William Henry Bainbrigge were and are bound by the agreement of the 30th of May, 1851, in the pleadings mentioned, which was signed by both of them.

Declare that under and by virtue of the said last-mentioned agreement John Moss became and is entitled to a charge and security upon the real estates in the pleadings mentioned as against Thomas Parker Bainbrigge and William Henry Bainbrigge, and as against the uses, trusts, and intents created by the marriage settlement of William Henry Bainbrigge, in the pleadings mentioned, for the said sum of 5877*l.* 3*s.* 5*d.* (if the interest should be given on that, the interest will have to be added), or so much thereof as remained due at the time of the signing of the same agreement of the 30th of May, 1851, and for the said sum of 2000*l.* and the interest thereon, or so much thereof as remained due at the last-mentioned time, and for the amount of all sums of money and bills of costs, charges, and expenses, which at the said last-mentioned time were due and owing from William Henry Bainbrigge to John Moss, and interest thereon; such amount and interest to be ascertained and computed in manner hereinafter mentioned.

• 337 Declare that in ascertaining such amount and the *interest thereon regard is to be had to the taxation directed by the Order of the 27th of July, 1853; and there is to be deemed to have been an annual delivery to William Henry Bainbrigge by John Moss of his bills of costs, charges, and expenses, and his account for the time being against William Henry Bainbrigge; and such delivery is to be deemed to have taken place on the 30th of May in each year. And the amount justly due upon each 30th day of May severally, on the footing of such bill and account for the time being (having regard to the taxation directed by the Order of the 27th of July, 1853) is to be considered as having carried interest at the rate of 5*l.* per cent per annum from each 30th day of May, but not so as to allow interest upon interest.

Declare that the amount on the said 30th of May, 1851, of the charge to which John Moss became entitled as aforesaid, carries

interest at the rate of 5*l.* per cent per annum from the said 30th of May, 1851.

Declare that such charge and interest have priority over any charge or security to which Thomas Parker Bainbrigge may be entitled upon the said estates or any part thereof.

Let an account be taken of what, having regard to the declarations aforesaid, is due to John Moss for principal and interest on the security of the said real estates.

Let the inquiry as to incumbrances, directed by the Order of the 22d of November, 1853, be prosecuted, and in the prosecution thereof regard is to be had to the declarations aforesaid.

We had better add to that, stay all other proceedings under that order, and the directions which are contained in that order.

* Declare that the costs of these suits to the present time, * 338 as well of appeal as otherwise, so far as they have been increased by or through the filing of the bill in the second-mentioned cause (except as far as respects the costs of Thomas Parker Bainbrigge's motion by way of appeal hereinafter mentioned) ought to be paid by the plaintiff in the said second-mentioned cause to the other parties to these suits respectively; and that the costs of the suits to the present time (as well of appeal as otherwise), so far as they have been increased by or through the filing of the bill in the third-mentioned cause, ought to be paid by the plaintiff therein to the other parties to these suits respectively; such costs respectively to be taxed, but the taxation thereof is to be deferred until after the further consideration of these causes.

Declare that the costs of Thomas Parker Bainbrigge's motion by way of appeal, the notice whereof is dated the 20th of June, 1854, ought to be paid by the said Thomas Parker Bainbrigge; such costs to be taxed, but the taxation thereof is to be deferred until after the further consideration of these causes.

Let the costs of the said John Moss's appeal motion, the notice whereof is dated the 24th of July, 1854, be, so far as not otherwise directed, costs in the first-mentioned cause.

Let a receiver of the rents and profits of the said real estates be appointed, with the usual directions, without prejudice to prior incumbrances, if any, and with directions to keep down their interest.

Let the further consideration of these causes stand adjourned, with liberty to apply.

February 17.

• 339 * The point reserved by the judgment of the Lords Justices, namely, whether Mr. Moss was entitled to interest on the 5877*l.* 3*s.* 5*d.* from the 18th November, 1845, to the 30th May, 1851, was this day argued before the full Court of appeal.

The Solicitor-General, for the plaintiff, insisted that he was entitled to the interest in question.

Mr. J. V. Prior, for the defendant Thomas Parker Bainbrigge, *contra*.

The Solicitor-General replied.

The following cases were cited in the course of the discussion: *Thimbleby v. Barron*, (a) *Hopkins v. Logan*, (b) *Lattimore v. Garrard*, (c) *Ford v. Beech*, (d) *Calton v. Bragg*, (e) *Herring v. The Dean and Chapter of St. Paul*. (g)

THE LORD CHANCELLOR—after referring to what had taken place before the Lords Justices, and stating the precise point which remained for decision as above mentioned—proceeded to the following effect: On the question as to when interest is and is not payable, it may, speaking generally and putting out of view the late statute, be assumed that interest on debts is payable only by virtue of contract between the parties. It is true that on mercantile instruments, as bills of exchange for instance, interest

* 340 is payable without * contract, that is, without special contract, a contract to pay being implied though not expressed; but ordinarily speaking, on the loan of money, just as of other things, nothing is capable of being recovered but that which has been lent.

The question then is, how it is to be ascertained whether there has been an agreement. There is, of course, no difficulty, if the parties have entered into a contract that can be proved; but it is oftener ascertained by showing the nature of the dealings between the parties, the Court or the jury inferring, without seeing an

(a) 3 M. & W. 210.

(b) 5 M. & W. 241.

(c) 1 Exch. 809.

(d) 11 Q. B. 852.

(e) 15 East, 223.

(g) 3 Swanst. 492.

agreement, that there must have been one, because the parties have dealt with each other in the way in which they would have dealt if there had been an agreement, or in a way in which they would not have dealt with each other if there had not been an agreement. That is the mode in which the parties here propose to make out that there was an agreement; alleging that in fact interest had been paid for many years, for thirty years I think, down to 1845. Every year a liability had been incurred, partly for money disbursed and partly for law business done, but no accounts had been rendered; and the way in which this is attempted to be explained, probably accurately, is, that the client said it was not convenient for him to pay from time to time, and the solicitor said that he would not require such payment, but that the client must pay him interest, so as to put him in the position that he would be in if he had sent in the bills yearly. I infer that to have been the agreement from the fact that the accounts were clearly so made up to the end of the year 1845, and being so made up, were, I consider, delivered to the client, because they were delivered to the client's relative, who had been himself a solicitor, who investigated them, and finally settled the amount due at above 9000*l.*, this being the amount due on the * footing of inter- * 341 est so calculated, but not due if interest had not been so calculated.

In this state of things the agreement of the 21st July, 1845, was entered into between the two brothers Thomas Parker Bainbrigge and William Henry Bainbrigge. These gentlemen being in litigation and having a chance (which eventually proved to be a good chance) of recovering a large estate, Thomas Parker Bainbrigge, who was the heir-at-law and the party who would be entitled to recover it, being for some reason or other ready to make it over to his brother William Henry, enters into this agreement, the effect of which was that the younger brother was to take the estate, or any sum that might be recovered in lieu of or by way of compensation for it, and to take on himself the burden of discharging the debt that had been incurred to Mr. Moss by the elder brother in the endeavour to get the estate. Thomas Parker Bainbrigge, in fact, says, that in consideration of my brother undertaking, in the event of the estate being recovered by him or receiving any compensation in lieu of the same, "to bear and pay all such costs,

charges, and expenses as I have incurred in reference to the estate of my late uncle Thomas Bainbrigge, Esq., deceased, together with interest after the rate of 5*l.* for each 100*l.* for a year on the principle of yearly rests on such costs, charges, and expenses up to the present time, I agree to relinquish, release, and make over" the estate to him. The fair inference from this is that the accounts of the costs, charges, and expenses were to be taken with interest at yearly rests, those being the terms on which Thomas Parker Bainbrigge had agreed to deal with his solicitor.

Such being the arrangement of the 21st July, 1845, an agreement was made in the following month of November

• 342 * between Thomas Parker Bainbrigge and Mr. Moss the solicitor, in which the principle of that arrangement is acted upon. The exact amount due having been then ascertained to be 9377*l.* 3*s.* 5*d.*, Mr. Bainbrigge says to Mr. Moss, I cannot pay you that sum, but I can pay you a part of it; and he accordingly, by arrangement, gives him 1500*l.* down in money and a promissory note for 2000*l.*, leaving a balance of 5800*l.*, the sum now in question, still unliquidated. The agreement made between them was this: Mr. Moss consented to take the 3500*l.*, made up of 1500*l.* in money and 2000*l.* on a promissory note, and that the rest should not be payable unless the estate was recovered; but if the estate was recovered, or if any thing was paid by way of compromise for the giving up of the claim to the estate, then he was to be paid the balance out of the estate, or out of the money received by way of compromise. Does this mean that he was to be paid the balance with interest or without? *Prima facie*, what the parties must have meant was, that the party to receive this 5800*l.* should be just in the same position when the event arrived which made it payable, as he would have been in if there had been no postponement, and he had had to receive it then. That, I think, would be the legitimate inference, and the subsequent conduct of the parties clearly shows that that is what they all intended.

A good deal has been said as to what was the legal consequence of postponing the payment. That does not strike me as being very material, because the real question is, what was the agreement between the parties. I am not, however, clear, if it were necessary to discuss that point, that there was not a good consideration for the postponement. I rather think that there was, but

it does not appear to me to be material, because I merely *look at the transaction as one from which I am to infer, * 343 as well as I can, what the agreement was as to interest; and the agreement which I must infer is, that the interest should continue payable as it was before, that the 3500*l.* was paid on account of principal and interest, and that the remainder of the debt was to go on upon the same footing on which it would have gone on if there had been no payment on account.

This view is, I think, confirmed by what happened afterwards, when the estate was recovered by Thomas Parker Bainbrigg, that is, by William Henry Bainbrigg, and the latter, being about to be married, was proceeding to make a settlement. The heads of the settlement were drawn up, giving a power to borrow a large sum of money, Mr. William Henry Bainbrigg stipulating that all sums and bills owing to Mr. Moss should be paid in preference to the amount which was to be paid to Mr. Thomas Parker Bainbrigg. The heads being drawn up, Mr. Moss objected because interest was not mentioned, and the parties thereupon inserted the word "interest." The wording, "all sums, interest, and bills," was inaccurate, but it shows that the meaning was, and that the parties understood, that Mr. Moss was to have interest, and not merely the principal sum.

There is a further confirmation in the fact that the two brothers enter into a formal agreement, making the sum a charge on the estate, agreeing that it should be payable with compound interest. It has been argued as if that was the commencement of the agreement for the interest, but I do not so understand it. It was the commencement of the charge on the estate; but it shows, in my opinion, that the parties were charging the estate with that which was a debt independent of the charge.

*The general result is, that I come to the conclusion * 344 that the agreement for the payment of interest, which is clearly established to have at one time existed, continued throughout, and, therefore, that in respect of the intermediate period now in question, as well as of the subsequent period, interest is payable. The parties having agreed that it shall be calculated at simple interest only, I give no opinion whether that was necessary or not. The declaration in the decree will be, that the plaintiff is entitled to a security upon the real estates for the sum of 5877*l.* 3*s.* 5*d.*, with interest thereon.

Some discussion then took place as to the date of the decree, and the form in which it should be drawn up. It was finally determined that the decree should be dated the 17th February, and be drawn up as the decree of the full Court of appeal.

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- * 345 • In the Matter of The DIRECT BIRMINGHAM, OXFORD, READING, AND BRIGHTON RAILWAY COMPANY, and in the Matter of The JOINT STOCK COMPANIES WINDING-UP ACTS, 1848 and 1849.

SPOTTISWOODE'S CASE.

AMSINCK'S CASE.

1855. January 12, 15, 16, 17. February 19, 20. May 2. Before the LORDS JUSTICES.

A. was, in his absence, chosen by the provisional committee of a provisionally registered railway to be one of the managing committee, to whom, by resolutions of the provisional committee then passed, power was given to allot shares and to apply the funds of the company in payment of expenses. The scheme having proved abortive, the allottees recovered their deposits in actions against A. and other persons who had been appointed to be members of the managing committee. The members of the managing committee thereupon appointed a sub-committee, of which A. was one, to take measures to protect the members of the committee. A. was a constant attendant at the meetings of the sub-committee, and took an active share in providing for some of the demands on the committee of management and resisting others. *Held*, that he thereby sanctioned and adopted the former proceedings of the managing committee, in which he had not taken part, and was liable to contribute in respect of them.¹

B., who was appointed and acted as a member of the managing committee of a provisionally registered railway company, with power to contract with engineers for the requisite surveys, &c., was one of the members liable in respect of an order given to the engineers, who afterwards, being unable to complete the contract by the required time, offered to forego it, and to substitute a contract for a part of the line only, on the terms that the completion of the latter within the time should not be required. At a meeting, at which B. was not present, the majority of the managing committee present resolved to accede to the proposal. B. at a subsequent meeting opposed the con-

¹ See 2 Lindley Partn. (Eng. ed. 1860) 1121-1124.

firmation of the resolution. Afterwards he concurred in resolutions for providing means of satisfying the engineers' demand among others: *Held*, that the substituted contract was only a modification of the contract, in respect of which B. was liable, and that under the circumstances B. was liable to contribute to the payment of the engineers' demand.

Contribution may be enforceable on general principles of justice, independently of contract.¹

THESE were exceptions to reports of the Master, which came on together with the further hearing of a petition, and were by special order heard originally by their Lordships.

The Direct Birmingham, Oxford, Reading, and * Brighton * 346 Railway Company was formed in the year 1845, for the purpose of constructing a railway from Birmingham to Oxford, and thence to Reading and Brighton. The prospectus then issued contained the names of a large number of persons as forming the provisional committee. At a meeting held on the 8th of October, 1845, fourteen members of the provisional committee were appointed a managing committee, with power, among other things, to contract with engineers for the completion of the surveys. Among the members so appointed were the exceptants, Mr. Andrew Spottiswoode and Major Amsinck.

Several meetings took place of different members so appointed to constitute the managing committee, at which shares were allotted, and engineers, solicitors, surveyors, and other persons employed; but in consequence of the panic which took place in November, 1845, the undertaking was abandoned.

After the abandonment of the scheme numerous actions were brought by allottees of shares who had paid their deposits against the different persons thus appointed members of the managing committee, to recover back the deposits so paid, and amongst others actions were brought against Mr. Spottiswoode, of which the well-known case of *Walstab v. Spottiswoode (a)* was one.

In consequence of the decision in that case the managing committee were compelled to return nearly the whole of the deposits to the allottees.

In December, 1849, when all the debts, with one or two exceptions, had been paid, and some few matters only remained to be

(a) 15 M. & W. 501.

¹ 1 Lindley Partn. (Eng. ed. 1860) 623, 624; *Lefroy v. Gore*, 1 Jo. & Lat. 571.

settled, an order was made by the Vice-Chancellor of England for the dissolution and winding-up of the company under the Winding-up Acts of 1848 and 1849.

In the settlement of the contributories the Master had placed on the list many hundred persons, including not only the members of the provisional and managing committees, but also the allottees of shares, including those who had, as well as those who had not, paid the deposit on the shares allotted.

The list was afterwards revised with reference to the decisions in the House of Lords of the cases of *Hutton v. Thomson* (a) and *Bright v. Hutton*, (b) and was reduced to those who had been appointed members of the managing committee, who were in number fourteen only. Of seven of these some had left the country, others had died insolvent, and the rest could not be found. Of the remaining seven the above-named exceptants were three. Three more and the personal representatives of the only other one were the respondents.

On the 6th of May, 1850, Mr. Spottiswoode was settled on the list of contributories as a member of the managing committee.

On June 13th, 1851, the Master reported that the amount of debts of the company which had been paid by the members of the committee of management amounted to 10,174*l.* 11*s.* 5*d.* In July, 1852, the Master made the first call of 250*l.* on each member of the committee of management for costs, whereupon Mr. Spottiswoode applied to the Master for leave to review the settlement of contributories, and such leave was granted. Mr. Spottiswoode, however, did not proceed to review the settlement, but paid the call.

* 348 * In December, 1852, a second call of 420*l.* each, for costs, was made, and was also paid by Mr. Spottiswoode. There was no appeal against either of these calls.

On the 3d of March, 1853, another call of 500*l.* was made, to be enforced against the provisional committee only, whose non-liability had not then been determined.

Mr. Spottiswoode shortly afterwards applied to the Master to review his reports making the two former calls; and, in support of his application, brought in a state of facts, stating that he never took any part in the undertaking, nor in the incurring any of its

(a) 3 H. L. Cas. 161.

(b) 3 H. L. Cas. 341.

expenses or liabilities, nor in receiving any of the deposits of the shareholders. That the first meeting which he attended in reference to the affairs of the above company (he not being then a shareholder) was on the 11th day of March, 1846, previously to which date the whole of the liabilities of the company had been incurred; that subsequently to such meeting, viz. on the 8th day of April, 1846, twenty shares were allotted to him; that he was induced to attend such meeting, because a verdict had been obtained by Mrs. Walstab against him, in consequence of his name appearing on the list of the provisional committee, though he had not sanctioned in any way the debt claimed by her; that his object in attending the said meeting of the 11th day of March, 1846, and subsequent meetings and accepting the above shares, was merely for the purpose of winding up the affairs of the company, and to spread the losses incurred amongst those who were liable for them; that he did not at any of the meetings which he so attended sanction any expenditure, save and except some legal expenses which had reference to liabilities incurred by the company prior to the 11th day of March, 1846, and that consequently

* he was not liable for any of the expenditure of the com- * 349
pany; that he paid at various times, for the use of the company, from the 8th day of April, 1846, sums amounting in the whole to 1927*l.* 19*s.* 5*d.*, the particulars whereof were stated in the schedule thereunto annexed; that until the decision of the case of *Bright v. Hutton*, by the House of Lords, on the 28th of June, 1852, the question of liability was in a state of uncertainty, and that during such uncertain state of the law he was placed on the list; that he attended a meeting before Master BROUGHAM, on the 6th day of July, 1852, but that his case was not then gone into; that the said meeting was adjourned until the 13th of July, 1852, but that he, understanding that it was the duty of the official manager to ascertain the amounts for which the several parties engaged in the undertaking were respectively liable, and that the amount which he was entitled to receive back for the payments made by him would be repaid to him by or through the medium of the official manager, did not further press his claim before the Master; that he had paid the calls of 250*l.* and 420*l.* (being calls for costs), the sum of 250*l.* being included in the sum of 1927*l.* 19*s.* 5*d.* so paid by him as aforesaid, and the said sum of 420*l.* not being included in the said last-mentioned sum.

On the 1st of March, 1853, Mr. Spottiswoode's application came on for hearing before Master TINNEY, who was attended by counsel on behalf of Mr. Spottiswoode, and also on behalf of the five other members of the managing committee above referred to, and ultimately the Master refused to enter into the consideration of Mr. Spottiswoode's state of facts and proposal, or to receive any evidence in support of them, and directed that Mr. Spottiswoode should pay the costs of the application.

* 350 * Against this decision of the Master Mr. Spottiswoode appealed (by leave) directly to the Lords Justices, and their Lordships, on the 23d day of March, 1853, ordered, that the Master should be at liberty to review the reports of the 6th day of July and the 8th day of December, 1852; and it was ordered that the Master should inquire and ascertain how and by whom and in what shares the calls of 500*l.*, 250*l.*, and 420*l.* ought, as amongst the contributories of the company, to be borne; and also whether Mr. Spottiswoode had paid the sum alleged to have been paid by him, and when and under what circumstances; and whether the contributories, or any and which of them, ought to bear and pay that sum in any and what proportions between themselves; and also how and by whom, and in what proportions as between the contributories, the 10,174*l.* 11*s.* 5*d.* mentioned in the report of the 13th day of June, 1851, ought to be borne. And the costs of all parties of that application, and the consideration of what (if any thing) ought to be done with respect to the costs which Mr. Spottiswoode had been, by the Master's certificate of the 1st day of March, 1853, directed to pay, were reserved.

On the 11th of December, 1854, the Master made his report, finding to the following effect:—

That on the 8th of October, 1845, a meeting of the provisional committee was held at the office of the company in Moorgate Street, at which meeting Mr. Spottiswoode was not present; that at such meeting fourteen members of the provisional committee were appointed a committee of management, whereof Mr. Spottiswoode was, with his own consent, appointed a member; that certain resolutions were then passed, and, among others, a resolution

that five members of the committee of management should
 * 351 be a quorum, and that the committee * of management
 should have power to allot shares and to apply the funds of the company in payment of all expenses incurred in its formation,

and in the preparation of the plans and sections to be submitted to Parliament; that a copy of the resolutions passed at the said meeting was forwarded to each member of the provisional and managing committee, and, amongst others, to Mr. Spottiswoode; that the several persons who were so appointed the managing committee accepted and took upon themselves the office and duties of such managing committee, and employed solicitors, agents, surveyors, engineers, and other persons to do and perform the acts necessary to be done in the formation of the company, and the preparation of the plans, sections, and books of reference required by the standing orders of the Houses of Parliament to be deposited on or before the 30th of November, 1845, in order to the obtaining an Act of incorporation in the then following session of Parliament; that such expenses and liabilities amounted in the whole to 10,174*l.* 11*s.* 5*d.* and 3508*l.* 12*s.*, making together the sum of 13,678*l.* 3*s.* 5*d.*; that although Mr. Spottiswoode did not attend the early meetings of the committee of management he was informed of their proceedings, and expressed himself satisfied therewith, and sanctioned and adopted them; that the committee of management proceeded to allot the shares in the company; that of the 67,630 shares allotted in the company the deposits were paid on 4295 shares only; that it consequently became impossible to proceed with the undertaking, and that the same was abandoned; that in the latter part of 1845 actions were brought against Mr. Spottiswoode by allottees of shares in the company, for the return of their deposits, and amongst others by Mrs. Walstab, who recovered a verdict in such action against him, and a rule *nisi* having been obtained to enter a nonsuit, the same was, after argument before the full Court of Exchequer, * discharged; that after * 852 such decision it became necessary to provide the funds for repaying such deposits, and that contributions were from time to time made for that purpose by some of the members of the managing committee, including Mr. Spottiswoode, and by some of the members of the provisional committee and allottees of shares; that the moneys so contributed were paid into the bankers of the company, and that the damages and costs in the action of *Walstab v. Spottiswoode* were, amongst others, paid out of the fund so contributed; that at a meeting of the committee of management on the 11th of March, 1846, at which Mr. Spottiswoode was present, he was elected a member of the sub-committee of management,

under whose direction the affairs of the company were thenceforward carried on; that at a meeting of the committee on the 22d of June, 1846, at which Mr. Spottiswoode was present, he was added to the finance committee; that nearly the whole of the fund raised by the aforesaid contributions and paid into the bankers, was applied in repaying deposits to allottees of shares; that checks to the amount of 4818*l.* and upwards, drawn upon the said bankers, were signed by Mr. Spottiswoode; that such fund being exhausted, Mr. Spottiswoode, Sir Arthur de Capel Broke, James Gadsden, Denzil Ibbetson Thomson, and Benjamin Davis agreed amongst themselves to discharge, and did discharge the remaining liabilities of the company which were not included in the 10,174*l.* 11*s.* 5*d.* among them in the shares and proportions which the Master specified; that it appeared by the report of the late Master BROUGHAM, of the 13th of June, 1851, that the contributions made by William Amsinck, Sir Arthur de Capel Broke, James Gadsden, Denzil Ibbetson Thomson, Benjamin Davis, and Andrew Spottiswoode towards the sum of 10,174*l.* 11*s.* 5*d.* were as follows

* 353 (namely): by William Amsinck, the sum * of 541*l.* 5*s.*; by Sir Arthur de Capel Broke, the sum of 1002*l.* 0*s.* 4*d.*; by James Gadsden, the sum of 844*l.* 10*s.* 5*d.*; by Denzil Ibbetson Thomson, the sum of 1103*l.* 17*s.* 4*d.*; by Benjamin Davis, the sum of 1002*l.* 0*s.* 4*d.*; and by Andrew Spottiswoode, the sum of 972*l.* 4*s.* 5*d.*; that the liabilities of the company thereinbefore mentioned as not included in the 10,174*l.* 11*s.* 5*d.*, and discharged by Sir Arthur de Capel Broke, James Gadsden, Denzil Ibbetson Thomson, Benjamin Davis, and Mr. Spottiswoode, as before mentioned, amounted to 3503*l.* 12*s.*; that such sum was contributed by the last-named parties in the proportions which the Master then set forth. The Master also certified his opinion to be that the members of the committee of management, as between themselves, were liable to bear and pay the expenses and liabilities so incurred, amounting to 10,174*l.* 11*s.* 5*d.* in equal shares. The Master further found that Mr. Spottiswoode, by his then solicitors, had notice of the several proceedings in the matter of the winding-up, and acquiesced therein up to the month of July, 1852; that on the 6th of May, 1850, Mr. Spottiswoode was settled on the list of contributors as a member of the managing committee, due notice having been given to him of his inclusion in the list in that character; that in the month of July, 1852, upon the said late Master making

the first call of 250*l.* on each member of the committee of management for costs, Mr. Spottiswoode applied to the said late Master for leave to review the settlement of the list of contributories, and such leave was granted, but that Mr. Spottiswoode afterwards waived his objection, and remained on the list as a member of the committee of management, and paid the call; that the second call of 420*l.* each for costs was made in December, 1852, and was paid by Mr. Spottiswoode, and that no appeal was made against either of the calls; that there were only six contributories on the list who * had paid or were able to pay the calls, namely, * 354 the persons above mentioned; that the calls of 250*l.* and 420*l.* so made on Mr. Spottiswoode, ought, as amongst the contributories of the company, to be borne and paid by him; that the call of 500*l.* was in effect a nominal call, so far as the six solvent members of the managing committee were concerned, and was intended to be enforced only against the other members of the managing committee, but who had not since paid the same or any part thereof; and that Mr. Spottiswoode had not paid the sum specified in an affidavit in the order mentioned, but had paid 166*l.* 16*s.* 2*d.*, part thereof, in the manner which the Master proceeded to set out. The Master then proceeded to find the sums which each of the six members ought to pay.

Exceptions to the above report were taken by Mr. Spottiswoode and Major Amsinck.

SPOTTISWOODE'S CASE.

The evidence on which the report was founded relating to Mr. Spottiswoode's case, was principally the following:—

A copy of a circular sent by the secretary on the 10th of October, 1845, to each member of the provisional and managing committee, inclosing a copy of the resolutions of the 8th of October, 1845.

The oral evidence of Mr. Spottiswoode, in which, when asked whether he received a printed copy of the resolutions passed at the meeting of the provisional committee on the 8th of October, 1845, replied that "he could not say positively that he did;" but when again asked as "to his belief," he replied, "I have no doubt it was so. I have no reason to disbelieve it; it is asserted that it was sent to me; I have no reason to doubt that it was sent."

* The oral evidence of Mr. Thomson, one of the members * 355 of the managing committee, who said, "I saw Mr. Spottis-

woode respecting the affairs of the company in the month of October (1845),—I cannot recollect the date,—in consequence of the secretary stating that he had seen Mr. Spottiswoode, and that he had promised to attend, but did not, I being anxious to see Mr. Spottiswoode, believing him to be a gentleman of the highest character, and well known in the commercial world. I was very anxious, as the other directors were, to see him at our board. I therefore agreed to call upon him. I went to the Liege and Namur Office, in Moorgate Street. The first time, I did not see Mr. Spottiswoode; he was not there; but the clerk told me the time he would be there, and I went and saw him, and stated to him the object of my calling. We were very anxious to see him at the committee. We had received the account from the secretary and we thought it better that one or other of the committee-men should wait upon him, and I, accordingly, was the individual selected. Mr. Spottiswoode told me he was so much engaged that he could not attend; that he was perfectly satisfied with the proceedings; that the secretary from time to time had called upon him, and reported how the company was going on. At the commencement of November, or quite the end of October, I called again and saw Mr. Spottiswoode. We were not exactly pleased with the conduct of our chairman and one or two other members, and we were very anxious Mr. Spottiswoode should attend. I called upon him again, and I saw him at that time, I think, in the board room. He said he was very much pressed for time, and it was most unfortunate that our company and the Liege and Namur met on the same day; that he, as president or chairman, I am not certain which, but I think as president, was bound to attend.

* 356 The secretary, *I have reason to believe, waited on Mr. Spottiswoode almost every day of meeting.”

The following letter from the solicitors of the company to Mr. Spottiswoode:—

“ December 10th, 1845.

“ Railway.

“ Dear Sir,— Mr. Blunt has handed your note over to us. We are exceedingly sorry that you are in any way annoyed. The inclosed report will show you exactly how the railway stands. We have received altogether, about 13,000*l.*; the expenses not being more than 8000*l.*, there is plenty to pay every thing and over; but

the question is, the whole deposits not having been paid in, whether those who have paid in have not a right to their deposits without deduction. We have, on behalf of the committee, taken the opinion of Sir FITZROY KELLY and Mr. Lloyd, who advise that the depositants are liable to expenses under all the circumstances. We submit to you that the best way will be for you to allow us to appear for you, as we shall for some others of the committee, and we shall then endeavour to get one action tried to settle the whole. Upon hearing from you we will write to Messrs. Baxendale & Co.

“ We are, sir, yours obediently,

“ PARKES, SMITH, & Co.”

The following reply to the above letter : —

“ New Street, December 11th, 1845.

“ Gentlemen, — I am obliged by your information, and will thank you to appear for me in the way you mention. It is my wish to retire from the concern, not from any doubt of its merits, or any distrust of the committee, but I cannot attend to it.

“ Your obedient servant,

“ A. SPOTTISWOODE.

“ Messrs. Parkes, Smith, & Co.”

* The minute-book of the company, containing minutes * 357 of numerous meetings of the managing committee in the months of March, May, June, August, and September, in 1846, at which Mr. Spottiswoode was present.

The following guarantee, signed by Mr. Spottiswoode and other members of the managing committee : —

“ To Mr. George Nathaniel White.

“ Sir, — As acting directors of the Birmingham and Brighton Railway Company, while they occupied their premises at No. 46, Moorgate Street, we acknowledge our liability to you for the rent of 32l. 10s., due for one quarter, ending on the 2d of September, 1847, jointly with William Amsinck of the Army and Navy Club, who, during the time aforesaid, was the deputy chairman of the said company. In consideration of the heavy payments which we have been called on to make on account of that company, and of Mr. Amsinck's not having paid any of the demands on the said

company, though liable to them equally with ourselves, we request you to sue him for payment of the above-mentioned demand, and in the event of your failing from any cause to recover against him, we hereby jointly and severally promise to pay you the said sum of 32*l.* 10*s.*, and any costs which you may have incurred in suing the above-named Mr. Amsinck.

“Dated the 28th day of February, 1848.”

MAJOR AMSINCK'S CASE.

During the several discussions before the Master, Major Amsinck appeared by a separate solicitor, who, by arrangement, carried in a state of facts on behalf of his client, to show why he was not to pay his full proportion of the 10,174*l.* 11*s.* 5*d.*

* 358 The nature of the case made by it appears from the * following written judgment of the Master: “On claim and statement of Sir Arthur de Capel Broke, Bart., James Gadsden, Esq., and Denzil Ibbetson Thomson, Esq., brought before me under the order of the Lords Justices, dated 23d March, 1853, and allowed by me as finally amended, subject to counter-statement, to be brought before me by Major Amsinck, and on statement brought before me by Major Amsinck, by way of counter-statement to the said statement of Sir Arthur de Capel Broke and others, and which counter-statement was finally argued before me on the 23d of December, 1853, so far as relates to the sum of 10,174*l.* 11*s.* 5*d.*, I confirm the allowance of the said claim and amended statement of Sir Arthur de Capel Broke and others, and I disallow the said counter-statement of the said Major Amsinck. I think that the Master's report of 13th June, 1851, is not to be considered conclusive as to the matters contained in the inquiries directed by the order of 23d March, 1853. But, on the whole, it appears to me that Major Amsinck became liable to contribute ratably with the five other contributories in the amended statement named to the whole engineering expenses and costs in Major Amsinck's counter-statement mentioned. As to the costs, Major Amsinck, by his counsel, waived before me his claim of exemption. As to the engineering expenses Major Amsinck did not dispute his liability in respect of 3000*l.*, the demands for which appeared to have accrued before the 7th of November, 1845. It appears to me, however, that the provisional committee, of which Major Amsinck was an

active member, gave the engineers directions (Major Amsinck's concurrence or assent to which was not disputed) to complete the whole line. Authority to alter the line and (it may be considered) to regulate or put an end to the engineers' operations appears to have been vested in the managing committee, of which Major Amsinck was an acting member.

* " On the 6th of November, 1845, a meeting of the man- * 359
aging committee was held with the express view of considering the question of putting a stop to the engineering expenses. Major Amsinck was present at that meeting. The question was adjourned to the following day. At the adjourned meeting, at which Major Amsinck was not present, it appears to me from the evidence, that the majority present was unwilling to stop the proceedings of the engineers, and that some of the members present, finding that they were unable to procure a resolution for stopping the proceedings, moved that the engineers should restrict their operations to a part of the line, and that the engineers consented to such restriction, on the terms that they should not be compelled to complete their work by the 30th of November then next, being the day necessary for procuring the required Act of Parliament in the course of the then next session of Parliament, and that they should be paid from time to time as their work proceeded, and a resolution passed accordingly. It appears to me that this measure was defensive on the part of those members of the committee who proposed it, and obtained the consent of the members present; that its object was not to continue the engineering operations, but to restrict them. A question might have been raised, whether in the absence of any restrictive order by the managing committee, the engineers could or could not have proceeded with the whole line, under the order of the provisional committee, it being apparent that the work could not be completed before the 30th of November. However, the resolution was not binding without confirmation. At a subsequent meeting, Major Amsinck appears to have objected to it, I believe, on the view or notion, that but for that resolution, the engineers could not lawfully have continued their operations; and I think he openly declared that * he considered himself not bound by * 360
the new contract with the engineers. A meeting was held on the 11th of November, at which Major Amsinck was present, and at that meeting, I think, Major Amsinck expressed his disap-

probation of the resolution, and his wish that it should be rescinded; whether he made any formal motion on the subject, or any express protest is, I think, doubtful on the evidence. However, the confirmation of the resolution was adjourned, and such confirmation never took place. I am disposed to think that the subject-matter of the arrangement entered into with the engineers, on the 7th of November, was within the powers of the managing committee, but that the members present on the 7th of November ought not to have entered into any agreement with the engineers, except subject to the confirmation of their proceedings by a subsequent meeting. And it may be open to argument, whether, if the matter had rested on the proceedings of the 11th of November, any person not present at the meeting of the 7th of November, nor agreeing to be bound by the arrangement then made with the engineers, would have been so bound, regard being had to the question whether the payments made to the engineers for their works under the arrangement, could or could not be sustained against all parties under the original order of the provisional committee. But it appears to me that Major Amsinck, as member of the managing committee, and also of the finance committee, appointed on the 20th of January, 1846, actually concurred in, or in confirming and adopting various resolutions, orders for payment, and other orders, measures, and proceedings relating to the demand of the engineers, and to the defences to be had recourse to against such demand, and the costs of such defences, and the means of meeting and resisting wholly or in part such

* 361 demand, in consequence of which Major * Amsinck became liable, together and ratably with the other five persons in question, for the sums paid to the engineers, and making part of the 10,174*l.* 11*s.* 5*d.*”

Mr. Spottiswoode objected to the following findings of matters of fact by the Master, among others: that Mr. Spottiswoode was, with his own consent, appointed a member of the committee of management; that a copy of the resolutions passed at the said meeting was forwarded to Mr. Spottiswoode; that Mr. Spottiswoode was informed of the proceedings of the committee of management, and expressed himself satisfied therewith, and sanctioned and adopted them; that the members of the committee of management, as between themselves, were liable to bear and pay the expenses and liabilities incurred, as in the report mentioned,

amounting to 10,174*l.* 11*s.* 5*d.* in equal shares ; that Mr. Spottiswoode afterwards waived his objection to be upon the list of contributories, as a member of the committee of management ; that the calls of 250*l.* and 420*l.* made on Mr. Spottiswoode ought, as amongst the contributories of the company, to be borne and paid by him ; that the sum of 5465*l.* 17*s.* 10*d.*, the residue of the said sum of 10,174*l.* 11*s.* 5*d.* ought to be borne and paid by William Amsinck, Sir Arthur de Capel Broke, James Gadsden, Denzil Ibbetson Thomson, Benjamin Davis, and Mr. Spottiswoode, in equal proportions ; that the proportion of the said sum of 5465*l.* 17*s.* 10*d.*, to be borne by each of the last-named parties, was 910*l.* 19*s.* 7*d.* ; and that the proportion of the sum of 3503*l.* 12*s.*, which ought to be borne by William Amsinck, Sir Arthur de Capel Broke, James Gadsden, Denzil Ibbetson Thomson, Benjamin Davis, and Mr. Spottiswoode was the sum of 583*l.* 18*s.* 8*d.* each.

By his notice of motion on the appeal, Mr. Spottiswoode sought a declaration that no part of the calls for * 500*l.*, * 362 250*l.*, and 420*l.*, or any of them, ought to be borne by Mr. Spottiswoode, but that all the said calls ought to be borne and paid by the contributories to the said company other than himself, that is to say, by William Amsinck, Sir Arthur de Capel Broke, Denzil Ibbetson Thomson, the said Denzil Ibbetson Thomson as executor of Benjamin Davis, deceased, and James Gadsden in equal proportions. And that the sums of 1661*l.* 16*s.* 2*d.*, 250*l.*, and 420*l.*, found by the Master to have been paid by Mr. Spottiswoode, were sums paid by him on account and for the benefit of the said company, and were debts due to him from the company, and that the same ought to be paid by the official manager out of the funds of the company, or by a call on the contributories other than Mr. Spottiswoode, and that the same ought to be borne and paid by all the said contributories other than Mr. Spottiswoode in equal proportions ; and that the said sums of 5445*l.* 17*s.* 10*d.* and 3503*l.* 12*s.* ought to be respectively borne and paid by the contributories other than Mr. Spottiswoode in equal proportions.

The nature of Major Amsinck's exceptions appears sufficiently from the judgment.

Mr. Selwyn, for Mr. Spottiswoode. — Mr. Spottiswoode never acted in any manner before March 11th, 1846. He gave none of the orders from which the debts which have been paid arose. The

only case alleged against him is that he was one of the managing committee. That would not, if established, make him liable. It has never been held that a managing committee-man is liable in that capacity. There has been no legal interpretation of the term "managing committee-man," any more than there has of the term "provisional committee-man," nor does such term, if shown to be applicable, involve of itself any legal liability.

To make a managing committee-man liable, it must be shown (as has been decided to be necessary with respect to a provisional committee-man) that he has given or concurred in some order out of which the liability arises. The respondents have therefore two propositions to establish: first, that Mr. Spottiswoode was placed on the managing committee with his consent, which the Master has found, but which Mr. Spottiswoode disputes; and, secondly, that his merely being on the committee without acting or concurring in giving any order is sufficient to render him liable, which he also disputes in point of law.

He referred to, and commented on *Bright v. Hutton*, (a) *Walstab v. Spottiswoode*, (b) *Woolmer's Case*, (c) *Gay's Case*. (d)

Mr. Cairns, for Major Amsinck. — Major Amsinck expressly objected to the contract with the engineers, and cannot therefore be said to have made himself liable in respect of it. The engineers were not in a position to perform the original contract by completing the work in time for the requisite deposit of the plans. There would therefore have been no liability in respect of their demand, but for the new contract which some of the managing committee-men chose to make with them for doing a part of the work without any stipulation as to time. To this new contract Major Amsinck was no party. On the contrary, he protested against it. It is impossible therefore to hold him bound by it.

He also argued against Major Amsinck's liability in respect of other detailed items in the charges. The nature of these arguments appears sufficiently from the judgments.

Mr. Daniel and *Mr. Roxburgh*, for the other three contributories.

(a) 3 H. L. Cas. 341.

(c) 2 De G., M. & G. 685.

(b) 15 M. & W. 501.

(d) 1 De G., M. & G. 347.

They referred to *Bell v. Lord Mexborough*, (a) *Barber's Case*, (b) *Norbury's Case*, (c) *Tanner's Case*. (d)

Mr. Selwyn, in reply on *Mr. Spottiswoode's case*.

Mr. Cairns, in reply on *Major Amsinck's case*.

Mr. H. Stevens, for the official manager, took no part in the argument.

Judgement reserved.

May 2.

THE LORD JUSTICE TURNER. — This case has stood for judgment longer than has been usual with us, in consequence partly of its importance, and partly of the difficulty which, on my part at least, has been felt as to the questions submitted for our determination.

The case came before us upon two motions: one on the part of *Mr. Spottiswoode*; the other of *Major Amsinck*. *Mr. Spottiswoode's* motion has for its object the repayment to him of all the moneys which he has paid on account of the company in respect of the expenses incurred on its behalf; the return of deposits to its shareholders; the costs of actions brought * by * 365 them, and by others, against different members, or alleged members, of the company, and the costs incurred in this matter for winding up its affairs. *Major Amsinck's* motion is directed merely to his exoneration from part of the above expenses and costs.

This company was projected in the year 1845, for constructing a railway from Birmingham to Oxford, and thence to Reading and Brighton, and was provisionally registered in the month of August in that year. A prospectus was soon afterwards issued containing the names of a great number of persons, described as constituting a provisional committee, and amongst those persons were *Mr. Spottiswoode* and *Major Amsinck*, the parties on whose behalf these motions are made, and also *Denzil Ibbetson Thomson*, *Benjamin Davis*, *James Gadsden*, and *Sir Richard Arthur de Capel Broke*, the other parties who have been represented before us

(a) 5 Railw. Cas. 149.

(c) 5 De G. & Sm. 423.

(b) 5 Railw. Cas. 606.

(d) 5 De G. & Sm. 182.

upon this occasion. The prospectus stated the capital of the company to be 2,000,000*l.*, divided into 80,000 shares of 25*l.* each. At a meeting of persons interested in the formation of the company, which was held on the 8th of October, 1845, resolutions were passed, by which, after re-forming the provisional committee, a committee of management, consisting of fourteen persons, of whom five were to be a quorum, was appointed, and it was resolved, amongst other things, that, until an Act of Parliament should be obtained, the affairs of the company should be under the control of the managing directors (the committee of management), to whom power was given to allot the shares, and to apply the funds of the company in payment of all the expenses incurred in its formation, and in the preparation of the plans and sections to be submitted to Parliament; and it was further resolved that power should be applied for in the Act, and it was in the

* 366 mean * time given to the managing directors, amongst other things, to extend or abandon any part of the line.

Mr. Spottiswoode, Major Amsinck, and the four other persons whom I have mentioned above, were continued as members of the provisional committee, and were appointed to be members of the managing committee. The other members of the managing committee have all, as we have been led to understand, become insolvent. The committee of management, soon after they were appointed, proceeded to allot the shares, and by the letters of allotment the deposits were made payable on or before the 24th of October, 1845. The number of shares thus allotted amounted to upwards of 67,000, but the deposits were paid on 4295 shares only, and it thus became impossible to proceed with the undertaking, which was accordingly soon afterwards abandoned.

In the mean time, however, expenses had been incurred and debts contracted by the managing committee, which, by the first report of the Master in this matter, dated the 13th of June, 1851, were found to amount to 10,174*l.* 11*s.* 5*d.*, and are now found to have exceeded that sum by 3503*l.* 12*s.*, making a total expenditure of 13,678*l.* 3*s.* 5*d.* It is not necessary, for the purpose of these motions, to distinguish the items of which this expenditure consisted, further than to state that it was composed of engineering expenses, to the amount of 5005*l.*, of which a considerable portion was incurred after the 7th of November, in part of law expenses

incurred in defending the actions for the recovery of the deposits, which I shall presently mention, and in part of a claim for rent accrued due after the 30th of November, 1845.

After the undertaking had been abandoned actions * were * 367 brought by allottees of shares to recover the deposits they had paid, and amongst these actions was one by a Mrs. Walstab, an allottee, against Mr. Spottiswoode, in which a verdict having been obtained by the plaintiff, and a rule *nisi* for a new trial granted, that rule was upon argument discharged by the Court of Exchequer, thus establishing that according to the law, as it was then considered to stand, Mr. Spottiswoode was liable to the allottees for the return of their deposits. In consequence of these actions, active proceedings were taken on the part of the managing committee for winding up the company and discharging its debts and liabilities, and a sub-committee of management was appointed mainly, as it would appear, for effecting those objects. On the 11th of March, 1846, Mr. Spottiswoode was appointed to be a member of the sub-committee of management, and he was afterwards, in the month of June, 1846, also chosen to be a member of the finance committee, under whose directions all the payments on account of the company were made. Until he thus became a member of the sub-committee of management, Mr. Spottiswoode took no active part in the affairs of the company, and attended none of the meetings of the managing committee. He had not even taken any shares in the company, but, upon being put upon the sub-committee of management, he began, and thenceforward continued, to interfere actively in the winding-up of the concern; and, for the purpose, as it is alleged, of better enabling him to do so with effect, he procured twenty shares in the company to be allotted to him, and paid the deposits upon them.

In the course of the winding-up of the concern, contributions were procured from several of the members of the provisional committee and from various allottees of shares towards the discharge of the debts and liabilities, and these contributions, to the extent of 4403*l.* 13*s.* 7*d.*, * were applied in part discharge of * 368 the 10,174*l.* 11*s.* 5*d.* The balance of that sum, amounting to 5570*l.* 17*s.* 10*d.*, was paid by different members of the managing committee in unequal proportions. Mr. Spottiswoode contributed the sum of 972*l.* 4*s.* 5*d.* towards the payment of the balance. The remaining liabilities of the company, amounting to 3503*l.* 12*s.*, were

agreed to be, and were, discharged by five of the members of the managing committee, of whom Mr. Spottiswoode was one, and the sum paid by him on this account amounts to 689*l.* 11*s.* 9*d.*

On the 21st of December, 1849, the winding-up order in this matter was made, and upon the settlement of the list of the contributories, under this order, Mr. Spottiswoode's name was placed upon the list as a member of the managing committee, and he still stands so placed upon the list. He and other members of the managing committee appear, through their common solicitor, to have concurred in a proposal for the appointment of an official manager, and also to have been authorized by the Master to attend, and to have attended before him for the purpose of resisting claims upon the company.

In the course of the proceedings in the Master's office two calls for costs were made on the members of the managing committee, one for 250*l.* each in the month of July, 1852, and the other for 420*l.* each in the month of December in that year, and these calls of 250*l.* and 420*l.* have been paid by Mr. Spottiswoode. Upon the occasion of the first of these calls being made, Mr. Spottiswoode applied for and obtained leave from the Master to bring under review the settlement of the list of contributories, but he did not prosecute the leave which he thus obtained. In addition to these calls for costs, a call for 500*l.* for debts was also made; but this call, it appears, was merely nominal, so far as respects the solvent

members of the managing committee, and was made only
* 369 for * the purpose of being enforced against the other mem-

bers of the managing committee, none of whom, as it seems, have been able to answer it. There was also, it appears, a call of 10*l.* per share, made by the Master on the 13th of June, 1851, on several of the contributories, including various members of the provisional committee; and this call was disputed by Mr. Bright, one of the members of that committee, who appealed from it first to this Court and afterwards to the House of Lords. Upon the appeal to the House of Lords the call was discharged, and it was held that members of provisional committees of projected railway companies, provisionally registered, and the affairs of which were put under the authority of a managing committee, were not liable to creditors for business done under the orders of the managing committee, although they had accepted shares and paid deposits upon them. In consequence of this decision, the whole of this

matter was brought before us in the month of March, 1853; and by an order dated the 23d of March, 1853, we ordered, &c. [His Lordship read the order as set out above.]

In pursuance of this order the Master has made his report, by which, in addition to the facts that I have mentioned, he has found: [His Lordship read the report.]

The motions before us are by way of appeal from this report. Mr. Spottiswoode, by his notice of motion, with which I propose first to deal, asks that the report may be discharged or varied as to several of the conclusions in point of fact, and as to the conclusions in point of law which I have just read, and prays: [His Lordship read the notice of motion, see ante, p. 361.]

Much of the argument before us was addressed to the *question of the sufficiency or insufficiency of the evidence * 370 before the Master to sustain the conclusions in point of fact contained in the report, but I do not think it necessary to enter into the question how far the evidence does or does not support each of those conclusions. The material question is, whether Mr. Spottiswoode ought or ought not to be deemed to have been a member of the managing committee of the company, before the 11th of March, 1846, when he was appointed to be a member of the sub-committee of management; and it will be sufficient for all the purposes of this motion to determine that single point.

I have examined the evidence upon this point, and I am fully satisfied that the just conclusion to be deduced from that evidence is, that Mr. Spottiswoode, from a very early period after the appointment of the committee of management, knew that he had been appointed to be a member of that committee, and assented to his having been so appointed. I think that the evidence of Mr. Thomson, contrasted with the unsatisfactory testimony given by Mr. Spottiswoode himself upon the subject, is of itself sufficient to establish the point; but if Mr. Thomson's evidence is open to any doubt, the conduct of Mr. Spottiswoode appears to me to remove that doubt. On the 11th of December, 1845, when the functions of the provisional committee had ceased, and he had taken no shares in the company, and had no right to interfere in its affairs, except as a member of the managing committee, he writes to the solicitors, expressing his desire to retire from the concern; and in the subsequent correspondence and resolutions he throughout treats himself as standing upon the same footing as the other members of the

managing committee. Under such circumstances he cannot now be permitted to say that he was not a member of that committee. Upon the evidence before us we are, in my opinion, bound to consider him as having been a member of it from the period of its formation.

It was said, however, on the part of Mr. Spottiswoode, that even looking at the case in this point of view, he was not liable for the debts of this company; that according to the case of *Bright v. Hutton*, the creditors could resort only to those who had contracted with them, and that, if he was at all to be considered as a member of the committee of management before the 11th of March, 1846, he was, at all events, a non-acting member of that committee up to that period, and had not before that time entered into any contract or come under any obligation on the part of the company. This, I think, appears to have been the case. I see no evidence to fix Mr. Spottiswoode with having personally acted in the affairs of this company before the 11th of March, 1846. But, giving him the full benefit of not having so acted, I do not think it follows that he would not have been originally liable to the creditors of the company, and much less do I think that it follows that he could not have been made liable to creditors upon proof that he had adopted or sanctioned the proceedings of the parties by whom the debts due to those creditors were contracted. The case of *Bright v. Hutton* does not seem to me to touch the question of the liability of directors for the acts of their co-directors, and certainly does not warrant the conclusion that directors who have sanctioned contracts, entered into by their co-directors, could not be made liable at law in respect of those contracts. It is not, however, necessary for us to decide any such question in the present case. The question before us is one, not of original liability to creditors, but of contribution, and questions of contribution often depend not upon contract, but upon the general principles of equity. The law upon this subject is well laid down in *Dering v. Lord Winchelsea*. (a) I collect from that case and the authorities there referred to, that where persons are joined together for one common end or purpose, they must bear equally the expenses incident to the attainment of that end or purpose. As it is expressed in one of

(a) 1 Cox, 319.

the cases there referred to, *In æquali jure*, the law requires equality.

This principle appears to me to apply to the directors of companies. They are united together for the purpose of effectuating the objects for which the companies are formed, and so far as they have acted together, or have adopted each other's proceedings, I think they must bear equally the burdens consequent upon their acts. The case of directors who have not acted does not of course fall within this rule, whatever other considerations may apply to it; and the rule may not and probably ought not to apply to directors who, upon sufficient grounds, have objected to the acts which have been done by their co-directors; but no such case of exception arises here. Mr. Spottiswoode, as it seems to me, has adopted every thing which has been done. He has qualified as a managing director. He has contributed to the payment of the liabilities contracted by his co-directors. As to part of those liabilities he has actually agreed to bear an equal proportion of them. It was said on his behalf that he has done all this in consequence of his having been held liable as a provisional committeeman in *Walstab v. Spottiswoode*; but, whatever may have been his motive for doing so, the fact that he has done so remains, and we cannot, I think, for any purpose material to the question before us, enter into the motives which influenced his actions. The decision in the case referred to did not render it necessary for him to qualify as a managing director, or to agree to bear an equal proportion of 3503*l.* 12*s.*; and, if he took those steps with a view to * his own advantage, he must be content to bear the * 373 liabilities consequent upon them.

I think that the conclusion at which the Master has arrived as to the liability of Mr. Spottiswoode in respect of the expenditure is correct, and his liability in respect of the costs follows, as of course; but I think the questions raised on his behalf admitted of so much doubt, that there ought to be no costs of his motion.

The other motion, that on the part of Major Amsinck, has for its object to exonerate him from bearing any proportion of the following expenses: 1st. The engineering expenses incurred subsequently to the 7th of November, 1845; 2d. The costs of actions brought against other members of the provisional committee for the recovery of deposits; and, 3d. The costs of an action brought by the landlord of the house where the business of the company

was carried on against Major Amsinck himself, for rent accrued subsequent to the 30th of November, 1845, and which action was brought at the instance of the other members of the managing committee, and was successfully defended by Major Amsinck.

As to the engineering expenses subsequent to the 7th November, 1845, the case appears to stand thus: There was originally an agreement with the engineers of the company to survey the whole line from Birmingham to Brighton; but on the 7th of November, 1845, it was agreed with the engineers that they should survey the line, from Birmingham to Guildford only, for a stipulated sum, and a resolution of the managing committee was passed in conformity with that agreement. Major Amsinck was not present when that resolution was passed, and it is alleged on his behalf,

that at the next subsequent meeting of the managing committee held on the * 374 11th of November, 1845, he opposed the confirmation of the minutes of the meeting of the 7th of November so far as they related to that resolution. Whether he did in fact thus oppose the confirmation of the minutes of the 7th November appears to be in dispute between the parties; but I assume that he did. It was contended on his behalf that the agreement, entered into with the engineers on the 7th of November, was a new agreement to which he was not a party, and which was entered into at a period when it had become impossible that the objects of the company could be carried out, and for which therefore he ought not to be held liable. It was not, however, denied on his part that he was a party to the original agreement with the engineers, and I think that the agreement made with them on the 7th of November cannot properly be considered as a new agreement or otherwise than as a modification of the original agreement, on which he would have been liable, the full performance of which would necessarily have been attended with greater expense than was incident to the arrangement entered into on the 7th of November, and the non-performance of which would have rendered him liable for damages. It appears, too, from the minute-books of the company, that, whatever may have been the views entertained by Major Amsinck on the 7th and 11th of November, 1845, he subsequently concurred in resolutions with reference to the engineers' charges, which cannot reasonably be considered to have rested on any other footing than the arrangement entered into with them on the 7th of November; and under

these circumstances, I think that Major Amsinck must bear an equal proportion with the other parties before us of the engineering expenses in question. It is the more just that he should do so, as it is not shown on his part that any of the other persons on whom the whole burden of these expenses would fall, if he is relieved from them, were willing parties to the arrangement * of the 7th of November ; and, on the contrary, it is plain * 375 from the evidence before us, that two of them at least were driven to adopt that arrangement as a compromise of a proposal on their part that no further expenses should be incurred.

As to Major Amsinck's claim to be exonerated from the costs of actions brought against other members of the managing committee for the recovery of deposits, I see no foundation for it, for Major Amsinck was himself a party to a resolution, by which the solicitor of the company was directed to defend the committee of management, either collectively or individually, in any law proceedings against them on account of the company. It was urged, in support of this claim, that the resolution was not acted upon in favour of Major Amsinck, and that he has been compelled to defend, at his own expense, several actions which have been brought against him on account of the company, but this has been the result of his own refusal to pay what he was justly bound to contribute, and he can therefore found no equity upon it.

For the same reasons I think that Major Amsinck must bear an equal proportion of the costs of the action brought against himself, the action having been brought in order to compel the payment by him of what he was justly bound to pay. These are the grounds upon which my opinion agrees with that of the Master upon Major Amsinck's case, but I think his motion also should be refused without costs.

The Lord Justice KNIGHT BRUCE concurred.

1854. August 3. December 18. 1855. February 12, 27. Before the LORDS JUSTICES, and Mr. Justice CRESSWELL and Mr. Justice VAUGHAN WILLIAMS.

Under the 45th, 46th, and 145th sections of the "Public Health Act, 1848," providing that the local boards may make necessary sewers through or under any lands whatever, and cause them to be emptied into such places as may be fit and necessary, provided that nothing in the Act shall authorize the boards to use, injure, or interfere with any watercourse, stream, river, &c., in which the owner of any lands may be interested, without the consent of such owner: *Held*, —

1. That persons having a right to watering-places in a river adjoining their lands, for the use of their cattle, are interested in the river within the meaning of the proviso, but would not be able to maintain an action for an interference with their rights, unless they were injured by such interference.¹
2. That works of a local board of health, producing an outfall of the sewage of a town above such a watering-place, was such an interference as to cause injury to the land-owners, but that whether this was established or not, it ought (if not consented to by them) to be restrained by injunction, being the act of a public body exceeding its powers.²
3. By CRESSWELL and WILLIAMS, Js., *dubitante* TURNER, L. J., that a right of fishing is within the term "land" according to the interpretation clause of the Public Health Act, 1848.

THIS was an appeal from an order made upon motion by the Master of the Rolls, restraining the local board of health for the district of Stratford-upon-Avon from, among other things, commencing, continuing, or prosecuting the construction of a sewer, so designed as to have an outfall or discharge into any part of the river Avon, between a bridge called Mill Bridge, and the beginning of a certain meadow called Weir Meadow. The case is reported below in the 19th volume of Mr. Beavan's Reports, p. 485.

¹ The injury must be substantial. *Attorney-General v. Gee*, L. R. 10 Eq. 131; *Lillywhite v. Trimmer*, 15 W. R. 763; *Attorney-General v. Steward*, 6 C. E. Green (N. J.), 340, 341; S. C. 5 C. E. Green, 415.

² *Kerr Inj.* 340, 341; *Broadbent v. The Imperial Gas Co.*, 7 De G., M. & G. 436; S. C., 7 H. L. Cas. 600; *post*, 389 and cases in n. (1); *Grand Junction Canal Co. v. Shugar*, L. R. 6 Ch. Ap. 483; *Ware v. Regent's Canal Co.*, 3 De G. & J. 227; *Attorney-General v. Colney Hatch Lunatic Asylum*, L. R. 4 Ch. Ap. 146.

The question on the appeal turned upon the construction of the following sections of the Public Health Act, 1848 (11 & 12 Vict. c. 63).

Sect. 45. "That the local board of health shall, from time to time, repair the sewers vested in them by this Act, and shall cause to be made such sewers as may be necessary for effectually draining their district for the purposes of this Act, and the said local board may carry * any such sewers through, across, or * 377 under any turnpike road, or any street or place laid out as or intended for a street, or under any cellar or vault which may be under the pavement or carriage-way of any street, and, after reasonable notice in writing in that behalf (if upon the report of the surveyor it should appear to be necessary), into, through, or under any lands whatsoever."

Sect. 46. "That the local board of health shall cause the sewers vested in them by this Act to be constructed, covered, and kept so as not to be a nuisance or injurious to health, and to be properly cleared, cleansed, and emptied; and for the purpose of clearing, cleansing, and emptying the same, they may construct and place either above or under ground such reservoirs, sluices, engines, and other works as may be necessary, and may cause all or any of such sewers to communicate with and be emptied into such places as may be fit and necessary, or to cause the sewage and refuse therefrom to be collected for sale for any purpose whatsoever, but so as not to create a nuisance."

Sect. 144. "That full compensation shall be made out of the general or special district rates, to be levied under this Act, to all persons sustaining any damage by reason of the exercise of any of the powers of this Act; and, in case of dispute as to amount, the same shall be settled by arbitration in the manner provided by this Act; or, if the compensation claimed do not exceed the sum of 20*l.*, the same may be ascertained by and recovered before justices in a summary manner."

Sect. 145. "That nothing in this Act shall be construed to authorize the local board of health to use, injure, or interfere with any sluices, floodgates, sewers, groynes, sea defences or other works already or hereafter made under the authority of any commissioners of sewers * appointed by the Crown, or any * 378 sewers or other works already or hereafter made and used

for the purpose of draining, preserving, or improving land under any local or private Act of Parliament, or for the purpose of irrigating lands, or to use, injure, or interfere with any watercourse, stream, river, dock, basin, wharf, quay, or towing-path in which the owner or occupier of any lands, mills, mines, or machinery, or the proprietors or undertakers of any canal or navigation, shall or may be interested, without consent in writing first had and obtained; and that nothing herein contained shall prejudice or affect the rights, privileges, powers, or authorities given or reserved to any person under any local or private Act of Parliament, for the drainage, preservation, or improvement of land, or for or in respect of any mills, mines, machinery, canal, or navigation as last aforesaid."

The interpretation clause (sect. 2) provides, that the word "lands" shall include messuages, buildings, lands, and hereditaments of any tenure.

By order in council, dated the 8th of March, 1850, and confirmed by Statute 13 & 14 Vict. c. 32, the borough and parish of Stratford-upon-Avon was duly constituted a district for the purposes of "The Public Health Act, 1848."

The plaintiffs claimed a right of free fishery in the river Avon under certain indentures of lease and release, dated respectively the 23d and 24th of March, 1787, whereby Lord Beauchamp, in consideration of 8300*l.* conveyed unto William Oldaker, his heirs and assigns (amongst other hereditaments), certain pieces or parcels of ground called the Brick Kiln Close and Fence Meadow, and the Lower Ham and Upper Ham, and also all

* 379 * that free fishery in the river Avon belonging to the hereditaments and premises conveyed by the deed.

In 1831 William Oldaker sold and conveyed to the proprietors of the Avon navigation the piece of land called the Upper Ham, and all his estate in the bed of the river in front of a portion of the Upper Ham, and in front of all of the Lower Ham as far as the middle of the stream, reserving, however, out of the conveyance, to himself, his heirs and assigns for ever, the sole and several right or other privilege, as then or theretofore used and enjoyed by him the said William Oldaker, of fishing in such part of the bed and soil of the said river, his right to which was thereby released and conveyed, and also the liberty and privilege of entering upon the said pieces or parcels of land thereby conveyed, or any part

thereof, at all reasonable times, for the purpose of fishing, and to land his and their nets thereon.

By a subsequent conveyance of October 22, 1835, other parts of the lands comprised in the deeds of 1787, including other parts of the bed of the river, were conveyed to the use of Mr. Charles Lucy, with an exception, in favour of the owners for the time being of Brick Kiln Close and Fence Meadow, of watering-places of sufficient length, width, and depth in the river adjoining those fields, for the use of the cattle or stock at any time thereafter to be kept therein, or in any part thereof respectively, with the right and liberty at all times of clearing, cleansing, deepening, and widening all such watering-places, and of removing the soil, gravel, and earth from the bed of the said river, for the purpose of obtaining a constant and sufficient supply of water for the use of such cattle and stock, and also a reservation of the free fishery in the water of the said river, whereof the bed or ground was thereinbefore conveyed.

* The plaintiffs claimed to be entitled as tenants in com- * 380
mon to five-sixth shares in the Brick Kiln Close and Fence Meadow, and to the watering-places in the river adjoining those closes, and to the rights and liberties reserved by the indenture of the 22d of October, 1835, and also to so much of the free fishery granted by Viscount Beauchamp as extended from a bridge called the Mill Bridge southward to the beginning of a meadow called the Weir Meadow.

In April, 1854, the local board of health for the district of Stratford-upon-Avon served a notice on the plaintiffs, therein described as owners of Fence Meadow and Brick Kiln Close, and also on Mr. Lucy, who was the occupier of Fence Meadow, and on the occupier of Brick Kiln Close, of the intention of the board to make a main sewer of the dimensions therein specified, from the river Avon, at the south end of Fence Meadow, underneath and through the same meadow, and underneath and through the Brick Kiln Close, to or near a gate therein described.

The proposed outfall for the main sewer specified in the above notice was at a part of the river to the fishery whereof the plaintiffs claimed to be entitled, at or against Fence Meadow, and between Mill Bridge and the beginning of the meadow called Weir Meadow.

The plaintiffs, by their bill and affidavits in support of the motion

on which the order under appeal was made, stated that the borough and parish of Stratford-upon-Avon contained no less than 5000 inhabitants, and that the current of the river at that part or side of it which was selected for the proposed outfall was weak, and that consequently the sewerage, instead of being quickly carried down

the stream, would gradually form deposits, or lodge and
 * 381 accumulate, and not wholly flow down the * river, and by polluting and contaminating the water would poison or injure the fish of the larger and best kinds, and that the nets would be injured thereby; and, moreover, that the watering-place at or near the southern or lower end of Fence Meadow, or that part thereof which was there used as a watering-place for cattle and stock upon the same meadow, was very near to the spot or point of the proposed outfall for the main sewer, and was lower down the river than such spot, and that such watering-place would be entirely spoilt, and the water thereat rendered so impure and nauseous by receiving the filth from such sewer as to become unwholesome and wholly unfit for the cattle to drink, and the prayer was for an injunction to restrain the execution of the proposed works.

In opposition to the motion an affidavit was made by the surveyor appointed by the local board of health for the district, that in his judgment the site of the intended outfall for the new main sewer was the best, and indeed the only practicable place for such outfall, and the witness supported this opinion by engineering details.

A fisherman, fifty-four years old, made an affidavit that he had known all his life the river Avon, more particularly at and about the town of Stratford-upon-Avon, and had for many years last past rented, at 10*l.* 8*s.* per annum, the fishery of another part of the river, of about the same length as that in question, but in which fish were taken in much greater quantities, and were of a larger size. He did not believe that the drainage which passed into the river by the three old drains caused any detriment to the fish in the river; but, on the contrary, believed the same to be beneficial to the fishery, inasmuch as the best fish were usually taken near
 the mouth of the drain; that he was continually applied to
 * 382 by * persons for liberty to fish in the said river, and he knew that the spot chosen by them for fishing was generally near the mouth of a drain; that there had been no difference in

the take of fish since a drainage from a brewery, which he specified, had been turned into the drain. He also stated his belief, founded on the effect produced by the existing drains, that the proposed works would not render the water impure, or unfit for cattle or culinary use.

Other witnesses deposed to the same effect.

Another witness deposed that he was well acquainted with Fence Meadow, and believed that there was no watering-place at or near the point at which it was alleged by the plaintiffs' affidavits to be, and that he considered, from the bank of the river being very steep, and the water itself being very deep, varying from ten to six feet at and near the said point, that it would be very dangerous for cattle to water there.

Mr. Lucy, who had been tenant of the said Fence Meadow for seventeen years and upwards, and during all the time had depastured large numbers of cattle therein, deposed that during the time he had been such tenant there had never been any watering-place in the said meadow other than one which he designated, and which was not that described by the plaintiffs' affidavits; but that occasionally, when the water of the river was drawn off, the cattle watered at another spot, which was itself higher than that described by the plaintiffs' affidavits; but that the proper and usual place for the watering of cattle was that which the witness had before designated; that he had known the meadow all his life, and had never heard of there being any watering-place at or near the place described as such in the plaintiffs' affidavits.

* Several other witnesses deposed to the same effect. * 383

On the appeal motion being made in August, 1854, a temporary order was made by consent, and it was arranged that the motion should be heard by their Lordships in Michaelmas term, with the assistance of two common-law Judges.

December 18.

Accordingly the motion came on to be heard this day before the Lords Justices, Mr. Justice CRESSWELL, and Mr. Justice VAUGHAN WILLIAMS.

Mr. R. Palmer and *Mr. Martindale*, in support of the appeal. — The plaintiffs put their case on two grounds: first, on the ground of injury to their property; secondly, on the ground of nuisance.

As to the latter the Court will not interfere on that ground, unless the nuisance is considerable, especially where a great public benefit will be obtained by the proceeding sought to be restrained. *Elmhirst v. Spencer*, (a) *Wood v. Sutcliffe*, (b) *Attorney-General v. The Sheffield Gas Company*. (c) With regard to the supposed injury to the plaintiffs' rights of fishery, in the first place they have not established such rights. The Avon is at the part of it in question a navigable river, in which consequently private rights of fishery do not exist. In the next place the evidence shows that the fishery is not at all injured. As to the watering-place for cattle the evidence shows that there is no such watering-place below the proposed outfall, or which could be injured by

* 384 the proposed proceedings. * But even if the plaintiffs made out their case, still the provisions of the Act are sufficient to authorize the works which have been restrained by the order under appeal.

The 45th section of the Act empowers the local board to carry the sewers into, through, or under "any lands whatsoever;" and the 46th section empowers them to cause all such sewers to communicate with and be emptied into such places as may be fit and necessary. These are quite sufficiently large powers to authorize what is intended to be done. The plaintiffs rely on the 145th section; but to give it the effect for which they contend would be to neutralize the effect of the Act.

Mr. Roupell, Mr. Hingeston, and Mr. Gray, for the respondents, referred to *Aldred's Case*, (d) *Mason v. Hill*, (e) *Magor v. Chadwick*, (g) *Wood v. Waud*, (h) *Frewin v. Lewis*, (i) *Dickenson v. The Grand Junction Canal Company*, (k) *Davenport v. Davenport*, (l) *East Lancashire Railway Company v. Hattersley*, (m) *Attorney-General v. The Sheffield Gas Consumers' Company*, (c) *Sparrow v. The Oxford, Worcester, and Wolverhampton Railway Company*. (n)

(a) 2 Mac. & Gor. 45.

(b) 2 Sim. N. S. 163.

(c) 3 De G., M. & G. 304.

(d) 9 Rep. 57 b.

(e) 3 B. & Ad. 304; 5 B. & Ad. 1.

(g) 11 A. & E. 571.

(h) 3 Exch. 748.

(i) 4 Myl. & Cr. 249.

(k) 15 Beav. 260.

(l) 7 Hare, 217.

(m) 8 Hare, 72.

(n) 9 Hare, 436; 2 De G., M. & G. 94.

Mr. R. Palmer, in reply.

Judgment reserved.

* Mr. Justice CRESSWELL and Mr. Justice WILLIAMS trans- * 385
mitted their written opinion to the Lords Justices. It was
as follows : —

“ In this case it appears that the respondents are owners of certain fields abutting on the river Avon, and are also owners of a general fishery in that river opposite the said fields. The local board of health for the district of Stratford-upon-Avon, which includes the fields of the respondents, have given notice of their intention to construct a main sewer through those fields, having an outfall from one of them into the river Avon, through which the sewage of the district would be discharged into that river.

“ We have been requested to state our opinion whether the local board are authorized by the Statute 11 & 12 Vict. c. 63, ‘ An Act for promoting the Public Health,’ to make such sewer and outfall without the consent in writing of the respondents ; and, after listening to and considering an able argument, we have arrived at the conclusion that they are not so authorized. On behalf of the appellants reliance was placed on the 45th section of the Act, by which it was enacted, ‘ that the local board of health shall, from time to time, repair the sewers vested in them by their Act, and shall cause to be made such sewers as may be necessary for effectually draining their district for the purpose of this Act : and the said local board may carry such sewers through, across, or under any turnpike road, &c., &c. into, through, or under *any lands whatsoever* ;’ and, on the 46th section, by which it was enacted, ‘ that the local board of health shall cause the sewers vested in them to be properly cleared, cleansed, and emptied ; and, for the purpose of clearing, cleansing, and emptying the same, they may construct and place either above or under ground such * reser- * 386
voirs, sluices, engines, and other works as may be necessary, and may cause all or any of such sewers to communicate with and be emptied into such places as may be fit and necessary.’ And it was contended that the 45th section gave power to make sewers into, through, and under any lands whatsoever, and therefore under the lands of the respondents. And the 46th section to cause

them to communicate with and be emptied into such places as may be fit and necessary, and that the river Avon, opposite the lands of the respondents, is a fit and necessary place.

“It is unnecessary to inquire whether the word *place*, as used in that section, would include a river circumstanced as the Avon is, at the spot in question, for the powers given by these two sections are, in our opinion, limited by the 145th section, by which it was declared and enacted (*inter alia*), ‘that nothing in this Act shall be construed to authorize the local board of health to use, injure, or interfere with, any watercourse, stream, river, dock, basin, wharf, quay, or towing path, in which the owner or occupier of any lands, mills, mines, or machinery, or the proprietors or undertakers of any canal or navigation, shall or may be interested, without consent in writing first had and obtained.’

“The first question arising on this section is whether the river Avon, at the place in question, is a river in which the respondents are interested. It appears that they are owners of the lands adjoining, and that they have a right to watering-places adjoining the said lands, of sufficient length, width, and depth for the use of the cattle or stock, at any time hereafter to be kept therein or in any part thereof: they are, therefore, in respect of those lands, interested in the river; and we desire not to be understood to

* 387 say that they are not so interested * also in respect of their fishery, for, according to the interpretation clause, the word ‘land,’ includes any kind of hereditament, and therefore a general fishery, and if in the clause ‘general fishery’ is substituted for ‘land,’ there does not appear to be any thing absurd or inconsistent in it.

“The next question is, does it appear that the appellants are about to use, injure, or interfere with the river Avon. They are certainly about to use it as a receptacle for the sewage of the district, and to interfere with it, by causing that sewage to be discharged into it; whether they are about to injure it or not is a question depending upon the evidence, which we are not called upon to determine.

“With regard to using or interfering with the river, it appears to us that the board of health, not having obtained the consent in writing of the respondents, cannot justify their proceedings by reason of the powers given by the Act of Parliament, but are left to the usual course of the common law. If they use or interfere

with the river to the prejudice of the rights of the respondents, they will be liable to an action; but the respondents are not owners of the soil of the river nor of the water; they have only certain rights in it, and although the board of health may use or interfere with the river without their consent, the respondents will not be able to maintain an action, unless their rights are injured."

February 27.

The Lord Justice KNIGHT BRUCE, after reading the foregoing opinion of the judges, said: The conclusion of the learned Judges, in favour of the plaintiffs, appears to me correct, although I do not * mean to say or intimate what I should have thought, * 388 or how I should have considered it. right to deal with the case, had the plaintiffs' only interest in the river been their fishery, or right of fishery.

I am of opinion, that the injunction granted at the Rolls may and ought to be supported, if on no other ground, at least on the ground of their right to watering-places in the stream, where it flows along the land in question, for the cattle that may be depastured there; the evidence convincing me that, in this respect, and for this purpose at least, the plaintiffs are interested in the river, as owners of the land in question, adjoining it, though they are not owners of the soil of the river, and that the defendants' intended works, if executed, would so much, so materially, and so permanently add to the pollution of the water, flowing by this land, as to render it very far more unwholesome, and less fit for the use of cattle, than it is.

I think that the injunction must stand.

THE LORD JUSTICE TURNER. — The learned Judges, who have been kind enough to give us the benefit of their assistance in this case, have certified their opinion to be, that the plaintiffs, having a right to watering-places in the river adjoining their lands for the use of the cattle and stock depasturing upon them, are therefore interested in the river in respect of those lands; that the works projected by the defendants would amount to a user or interference with the river; and that the defendants, not having obtained the consent in writing of the plaintiffs, cannot justify such user or interference under the powers given by the Act of Parliament; but the learned Judges have left open the question whether,

* 389 * upon the evidence before us, the projected works of the defendants would injure the river, and have stated their opinion to be, that the plaintiffs not being owners of the soil of the river, nor of the water, but having only certain rights in it, would not be able, unless their rights were injured, to maintain any action against the defendants in respect of their user of, or interference with, the river.

If it was necessary for us to determine the question of injury, to which the learned Judges have referred, I should have no difficulty in concluding, from the evidence in this case, that the rights of the plaintiffs in the water must necessarily be injured by the projected works of the defendants; for it does not seem to me to be possible that the water of the river at and near to the proposed outfall of the sewer could be as pure and wholesome after the sewage has been infused into it as it is at the present time.¹

It does not seem to me, however, to be necessary to determine this point, for I fully concur in the opinion of the Judges upon the other points; and, if the defendants have not the right under the Act of Parliament to use or interfere with the river without the written consent of the plaintiffs, which they have not obtained, I do not see how they can be justified in carrying the sewer through the plaintiffs' land for the ultimate purpose of such user or interference. This consideration alone seems to me to be sufficient to support the injunction granted by the Master of the Rolls; and I more readily concur in supporting it, as this is the case of a public body intending to exceed its legal powers, and the authority of this Court cannot, in my opinion, be more usefully exercised than in restraining such proceedings. I fully adopt in this respect the views expressed by Lord COTTENHAM in *Frewin v. Lewis*. (a)

* 390 * I observe that the learned Judges, in the opinion with which they have favoured us, refer to the plaintiffs' rights in

(a) 4 Myl. & Cr. 254.

¹ See Kerr Inj. 393, 394; Goldsmid v. Tunbridge Wells Impr. Comm., L. R. 1 Ch. Ap. 349; Elmhirst v. Spencer, 2 M'N. & G. 45 and cases in notes; Attorney-General v. Luton Board of Health, 2 Jur. N. S. 180; Attorney-General v. Borough of Birmingham, 4 K. & J. 528; 2 Dan. Ch. Pr. (4th Am. ed.) 1638 and cases in n. (3); Merrifield v. Lombard, 13 Allen, 16; Holsman v. Boiling Spring Bleaching Co., 1 McCarter (N. J.), 335; Angell Watercourses (6th ed.), § 450 a, and note; Attorney-General v. Colney Hatch Lunatic Asylum, L. R. 4 Ch. Ap. 146; Baxendale v. McMurray, L. R. 2 Ch. Ap. 790; Attorney-General v. Leeds Corp., L. R. 5 Ch. Ap. 583.

respect of their fishery, and intimate an opinion that, having regard to the interpretation clause of the Act, the word "land" in the 145th section ought to be construed to include a fishery. Without intimating any dissent from what the learned Judges have said upon this point, I desire to be understood as giving no opinion upon it. It is unnecessary in the present case to decide the question; and although I agree that it is difficult to suppose that the legislature could intend to protect land which might be of little value, and not to extend the same protection to a fishery, the value of which might be ten times as great, there is so much ambiguity arising from the context of the section that the question cannot, I think, be represented otherwise than as open to very serious doubt.

I think the motion in this case must be refused with costs.

* BEWLEY v. HANCOCK.

* 391

1855. December 7, 8, 10, 12, 13, 15. 1856. January 18. May 24. Before the Lord Chancellor Lord CRANWORTH.

An agreement was entered into between four persons who were interested in certain patents and inventions relating to gutta-percha, that all patents taken out or in the course of being taken or intended to be taken out, or that might at any time thereafter be taken out, by any or either of them, or on account of and for the benefit of any or either of them, in relation to the preparation and application of gutta-percha or the manufacture of any articles therefrom, should be assigned to trustees and held for their common benefit. Subsequently one of the parties took out a patent for "improvements in apparatus and machinery for giving shape and configuration to plastic substances," and refused to assign the patent to the trustees, alleging that it was not comprised in the agreement: *Held*, that the patent, so far as it related to gutta-percha, was subject to the trusts of the agreement, and that it could not be treated as not being so because it was for machinery which might be applied to the manufacture of articles of gutta-percha, and was not for the manufacture of any such articles.

THIS was an appeal by the defendant Charles Hancock, from a decree made by Vice-Chancellor STUART, at the hearing of the cause upon motion for a decree. The following is a short statement of the facts of the case.

Previously to the 31st May, 1845, on which day the agreement was made on which the question in the suit arose, the several parties to that agreement had become interested in various ways in certain patents relating to the application of gutta-percha or gutta-tuban to manufacturing purposes. The defendant, C. Hancock, had also taken out a patent, dated the 15th May, 1844, for an invention, entitled "Certain improvements in cork and other stoppers and a new composition or substance which may be used as a substitute for and in preference to cork and a method or methods of manufacturing the said new composition or substance into bungs, stoppers and other useful articles," and had enrolled a specification, claiming as his invention, comprised in the patent,

various modes of applying gutta-percha in combination
 * 392 with cork and other materials in the * manufacture of corks, stoppers, and other articles. The plaintiff Henry Bewley, by an agreement with C. Hancock dated the 4th April, 1845, had obtained a grant of an exclusive license for the use of the last-mentioned patent, and had also himself previously to the 31st May, 1845, invented certain new modes of applying gutta-percha to the manufacture of syringes and other such like articles, and was about to apply for a patent for the invention.

On the 31st May, 1845, the several parties interested in the patents above referred to, and for the purpose of defining and declaring their rights therein, entered into the following agreement: "Memorandum of agreement between Mr. Christopher Nickels of York Road Lambeth Mr. Charles Hancock of Grosvenor Place Artist Charles Keene of Sussex Place Esq. and Henry Bewley of Dublin Esq. Whereas by a former memorandum of agreement dated 5th of February 1845 entered into between Mr. Nickels and Mr. Hancock it was recited that Mr. Nickels had invented several applications of gutta percha or gutta tuban to new purposes for which patents for England and France and other parts had been or were to be applied for and had been materially assisted by Mr. Hancock in perfecting the details of the said invention wherefore it was agreed between the said parties that the said patents should be taken out for their joint benefit share and share alike and that the expenses of procuring the same should be defrayed by the parties in the like proportions and that the said agreement should extend to all improvements connected with gutta percha for which either of the parties should at any time obtain patents.

And whereas Mr. Hancock has invented certain other applications of gutta percha or gutta tuban for which * patents * 393 for England and foreign countries are in the course of being applied for and has also had communicated to him various improvements in the preparation and application of the said substances and the manufacture of articles therefrom for which letters patent for England have been taken out on his behalf in the name of Richard Archibald Brooman of 166 Fleet Street. And whereas Mr. Keene has invented certain improvements in boots and shoes gaiters overalls and other like articles of apparel for which letters patent for England have been obtained which improvements consist in the application thereto of the said substance called gutta percha or gutta tuban and has agreed to contribute to the half of the expenses to be paid by Mr. Nickels as aforesaid in the proportion and manner separately arranged and settled between themselves And whereas Mr. Bewley has invented certain improvements in flexible syringes tubes bottles hose and other like vehicles and vessels for which he has applied for letters patent and has also agreed to pay Mr. Hancock a certain sum or sums of money in manner also separately arranged and settled between themselves Now it is hereby agreed by and between the said four parties as follows First that for the considerations aforesaid all patents taken out or in the course of being taken or intended to be taken out or that may at any time hereafter be taken out by any or either of them or on account of and for the benefit of any or either of them in relation to the preparation and application of gutta percha or gutta tuban or the manufacture of any articles therefrom of which so far as at present known to and decided upon by the said parties a schedule has been signed by them of even date with this memorandum shall be held for their joint account in the proportions following Messrs. Nickels and Keene to have one half and Messrs. Hancock and Bewley the other half Second that the parties hereto shall as soon * as conveniently may be assign and transfer the whole of * 394 the said patents and of their respective rights thereto to two trustees one to be named by Messrs. Nickels and Keene and one by Messrs. Hancock and Bewley to be held by the said trustees for the benefit of the said parties in the proportions before specified and under such conditions and subject to such directions as are usual in such cases or as may be necessary for the convenient and

profitable working thereof Third that the whole of the expenses of procuring and specifying or otherwise securing and perfecting the said patents or of opposing the grant of any conflicting patents shall be paid one half by Messrs. Nickels and Keene and the other half by Messrs. Hancock and Bewley Fourth that all expenses incurred by any or either of them in maturing and perfecting the inventions which are the subject matters of the said patents or in the purchase of the raw material or materials therefor shall also be defrayed in the same proportions as aforesaid subject however to this condition that no single outlay exceeding one hundred pounds shall be made or incurred by any one of the said parties without the previous consent in writing of the others or a majority of them Fifth that should any of the parties hereto hereafter invent or discover or have communicated to him or them any invention or discovery relating to the use of gutta percha or gutta tuban for manufacturing purposes or to any substance which may serve as a substitute for the same or which may be combined therewith (excepting always caoutchouc or such other substances as are already known and in general use) he shall forthwith communicate the same to the other parties and if letters patent for the same at home or abroad should be thereafter taken out by the consent of the said parties or of a majority of them such letters patent shall be forthwith assigned to the trustees of the

* 395 * original patents for the common benefit and under the like conditions and directions."

In a schedule to the agreement were enumerated the several patents before referred to, except that of the 15th May, 1844, and also certain patents for which it was then intended to apply. Of the patents so included in the schedule, there was one, dated the 27th March, 1845, for England, Wales, and Berwick-upon-Tweed, granted to R. A. Brooman as a trustee on behalf of C. Hancock, for an invention of "a thread made from a substance not hitherto applied to that purpose, and also the application of it to the manufacture of piece goods ribands paper and other articles."

Between the 31st May, 1845, and the 21st January, 1846, various patents were taken out on behalf of the parties to the agreement for inventions relating to gutta-percha and its application to manufacturing purposes, one of these being a patent taken out by the plaintiff on the 4th September, 1845, for England, Wales, and Berwick-upon-Tweed, for the invention of "certain

improvements in flexible syringes tubes bottles hose and other like vehicles and vessels."

On the 21st January, 1846, a deed of that date was executed, carrying into effect the agreement of the 31st May, 1845, and assigning the patents taken out to two trustees therein named.

On the 15th May, 1846, the defendant C. Hancock obtained a patent for the invention of "certain improvements in the manufacture of gutta-percha and its applications alone and in combination with other substances."

* In the autumn of 1846, an arrangement was made * 396 between the parties to the agreement of the 31st May, 1845, and which was embodied in another agreement and deed both dated the 2d October, 1846, by which the plaintiff and the defendant C. Hancock became entitled to work the patents exclusively of the other parties to the agreement, the plaintiff making certain payments to those parties; and, as between the plaintiff and the defendant C. Hancock, an arrangement was at the same time entered into by which the plaintiff undertook to work the patents at his own expense, and to retain the defendant C. Hancock in his employ at a salary of 800*l.* a year for three years. This agreement between the plaintiff and C. Hancock was contained in the following letter from the plaintiff to the defendant C. Hancock, dated the 24th September, 1846: "Dear Sir,—In consideration of your devoting your time and abilities to the carrying out and improving the various manufactures comprised under the gutta-percha patents and to the furthering the general interests thereof during the next three years commencing from the date of this letter I hereby engage to pay you at the rate of 800*l.* a year as a compensation for the same. Should I cease to work the patents, this engagement is to cease."

The plaintiff, under this last-mentioned agreement, worked the patents and carried on his business with a partner under the name or style of the "Gutta-percha Company:" the defendant C. Hancock was employed in the establishment assisting the plaintiff in the business, making experiments, &c., and had at all times the use of the workmen and machinery of the plaintiff and his partner.

In the course of the experiments made by the defendant C. Hancock, further improvements were discovered, * and * 397 various patents for these improvements were taken out in

the name of the defendant C. Hancock. One of these, dated the 10th February, 1847, was granted to the defendant C. Hancock for England, Wales, Berwick-upon-Tweed, and the islands of Jersey, Guernsey, Alderney, Sark, and Man, and the British colonies, for an invention entitled "certain improvements in the preparation of gutta-percha and in the application thereof alone and in combination with other materials to manufacturing purposes which improvements were also applicable to other substances."

Early in 1848 the defendant C. Hancock became dissatisfied with his position in respect to the plaintiff, and differences occurred between them, which ended in the defendant C. Hancock withdrawing himself from the performance of his duties.

After this, and on the 29th July, 1848, the defendant C. Hancock took out a patent for England, Wales, Berwick-upon-Tweed, the Channel Islands, and British colonies for an invention entitled "improvements in apparatus and machinery for giving shape and configuration to plastic substances;" and on the 3d August, 1848, he gave notice to the plaintiff that certain of the machinery and apparatus used in the plaintiff's factory was an infringement of this patent. The plaintiff then formally dismissed C. Hancock from his employ. A specification of the subject-matter of the patent of the 29th July, 1848, was filed by C. Hancock on the 29th January, 1849, the contents of which are mentioned in the judgment of the Lord Chancellor.

After other proceedings, which it is not necessary to notice, the present suit was instituted by the plaintiff for the purpose
 * 398 of obtaining a declaration that the patent * of the 29th July, 1848, was comprised in and was subject to the agreement of the 31st May, 1845, that the defendant C. Hancock might be decreed to assign the various patents taken out in his name since the agreement including that of the 29th July, 1848, that he might be restrained from taking proceedings to affect in any way the several last-mentioned patents, and also from holding himself out as possessing under the patent of the 15th May, 1844, in violation of the agreement the sole right to manufacture gutta-percha or articles composed thereof, or from dealing with that patent in derogation of or in opposition to the patents comprised in the agreement.

The cause was heard on a motion for a decree by Vice-Chan-

cellor STUART in June, 1855; and by a decree dated the 28th June, 1855, it was declared that the patent of the 29th July, 1848, together with the other patents, were subject to the terms of the agreement of the 31st May, 1845, and that the plaintiff was entitled to have them assigned to trustees upon the trusts mentioned and declared in the indenture of the 21st January, 1846, and it was ordered that the defendant C. Hancock should assign the same accordingly. The decree contained directions consequential on these declarations, and restrained the defendant C. Hancock from entering any disclaimer or memorandum of alteration affecting the last-mentioned patent or the several other patents taken out since the 21st January, 1846, without the consent and concurrence of the plaintiff and the other persons interested therein; and it also restrained him from granting any licenses under or from holding himself out by advertisement or otherwise as sole proprietor of the several patents taken out since the 21st January, 1846, or any of them, or from otherwise dealing with the same several patents or any of them in violation * of the * 399 agreement of the 31st May, 1845, and also from holding himself out by advertisements or otherwise under colour of the patent of the 15th May, 1844, in violation of the same agreement as possessing the sole right to manufacture gutta-percha, or articles composed thereof, and from otherwise dealing with the said patent in derogation of or in opposition to the several patents comprised in and subject to such agreement, and the rights thereby conferred on the plaintiff and the other persons interested under the same agreement; and all parties were to be at liberty to apply at chambers to have a proper arrangement approved of as to the working of the said patents, and as to the profits and emoluments to be derived therefrom; and the order was to be without prejudice to the defendant C. Hancock's rights under the letters-patent of the 15th May, 1844, and to any question as to any right of the defendant C. Hancock to the benefit of the letters-patent of the 29th July, 1848, in their application to any substances other than gutta-percha or gutta-tuban, or any substances which might serve as a substitute for gutta-percha or gutta-tuban or which might be combined therewith, excepting caoutchouc or such other substances as were already known and in general use.

From this decree the defendant appealed, and asked that the plaintiff's bill might be dismissed with costs.

The Solicitor-General, Mr. Bacon, Mr. Hindmarch, and Mr. Fowler, for the plaintiff, supported the decree of the Vice-Chancellor. — They submitted that the real question was, whether the patent of the 29th July, 1848, taken out by the defendant C. Hancock, was or was not comprised in the agreement of the * 400 31st May, 1845. They insisted * that it was, and that therefore the decree of the Vice-Chancellor was correct.

Mr. Malins, Mr. G. M. Giffard, and Mr. T. Webster, for the appellant, C. Hancock. — They insisted that the patent in question was not included in the agreement; that the agreement was one which, from the nature of the contract and its uncertainty, the Court would not interfere to enforce; and that the plaintiff had a complete remedy at law, citing on this last point the observation of Lord COTTENHAM in *Sturgis v. Champneys*: (a) “Hence arises the extensive and beneficial rule of this Court, that he who asks for equity must do equity, that is, this Court refuses its aid to give to the plaintiff what the law would give him, if the Courts of common law had jurisdiction to enforce it, without imposing upon him conditions which the Court considers he ought to comply with, although the subject of the condition should be one which this Court would not otherwise enforce.”

Mr. C. Simpson appeared for other parties.

The Solicitor-General replied.

The following cases were also cited or referred to in the course of the argument: *Heath v. Unwin*, (b) *Jefferys v. Boosey*, (c) *Milnes v. Gery*, (d) *The South Wales Railway Company v. Wythes*, (e) *Lumley v. Wagner*, (g) *Taylor v. Portington*, * 401 (h) *Gervais v. Edwards*, (i) *Dietrichsen v. Cabburn*, (k) *Hills v. Croll* (l) *Downs v. Collins*, (m) *Henderson v. Eason*, (n) *M' Mahon v. Burchell*. (o)

(a) 5 Myl. & Cr. 97, p. 102.

(b) 13 M. & W. 583.

(c) 4 H. L. Cas. 815.

(d) 14 Ves. 400.

(e) 1 K. & J. 186.

(l) 2 Phil. 60; and see 1 De G., M. & G. 627, n.

(m) 6 Hare, 418.

(g) 1 De G., M. & G. 604.

(h) 1 Jur. (N. S.) 1057.

(i) 2 Dru. & War. 80.

(k) 2 Phil. 52.

(n) 17 Q. B. 701.

(o) 2 Phil. 127.

1856. January 18.

THE LORD CHANCELLOR. — The great question in this case is, whether the patent of the 29th July, 1848, is a patent subject to the trusts of the agreement of the 31st May, 1845, whether it is within the meaning of that agreement, “a patent taken out” and “in relation to the preparation and application of gutta-percha or gutta-tuban or the manufacture of any articles therefrom.” The plaintiff contends that it is, and the defendant C. Hancock says it is not.

It appears from the specification, which was duly filed on the 29th January, 1849, that the invention for which the patent was granted consisted of several particulars: it will be sufficient to class them under two heads, first, certain machinery for moulding hollow wares, being machinery constructed in great measure on the principle of the potter’s wheel, and, secondly, an apparatus for covering or coating wire or cord to an indefinite length with any plastic substance. Machinery for moulding hollow wares, constructed on the principle of the potter’s wheel and called the spinning machine, has been largely used by the plaintiff in the manufacture of vases, cups, bowls, and other articles to which gutta-percha has been applied by him. This machinery is substantially the same as that described in Hancock’s specification, and must, I think, be taken on the evidence to have been invented by him while he was acting * for the plaintiff under * 402 the retainer or agreement of the 24th September, 1846.

With respect to the machinery described in the specification for coating wire or cord with any plastic substance, the plaintiff contends that his patent of the 4th September, 1845, did describe machinery which was substantially the same as that included in the specification filed under the patent of the 29th July, 1848. On this point I do not think it necessary to give a decided opinion. The question is not whether the machinery described in the defendant’s specification is machinery which the plaintiff has used or might use independently of any contracts or stipulations with the defendant Hancock, but whether, on the true construction of the agreement of the 31st May, 1845, it is subject to the trusts thereby created. The plaintiff says it is, because it is a patent taken out in relation to the application of gutta-percha and the manufacture of articles therefrom. The defendant Hancock says it is not, that in the first place it is not a patent for the manufac-

ture of any article whatever, but a patent for the invention of a machine or machines to be used in manufacturing various articles, and, secondly, that though it may be applicable to the manufacture of articles to be made of gutta-percha, yet it is not confined to articles made of that material, but is equally applicable to the manufacture of various other substances. I do not, however, think that either of these arguments can be successfully maintained. I do not doubt the accuracy of the proposition maintained at the bar, that there may be a wide distinction between a patent for the invention of any useful article of commerce, and a patent for the invention of machinery, by which such an article may be manufactured. A discovery that the mixture of two or more simple substances, in certain definite proportions, will form a com-

pound substance valuable for medical or other qualities,
 * 403 would afford a good ground for a patent.¹ A discovery * of some machinery, whereby such a mixture may be more quickly or more effectually accomplished, might be the foundation of another patent, and instances might be almost indefinitely multiplied. When, however, we look to the subject-matter of this patent, it is plain that such a distinction never could be supported. The parties to the agreement of the 31st May, 1845, had in common the knowledge of a substance which they had discovered might be used in the manufacture of various useful articles of commerce, such, for instance, as piece goods, the binding of books, shoes, gaiters, corks, and several other things. For all these objects patents had been obtained, and, except as to the cork patent, the patents were to be held for their common benefit; but they foresaw that experience would probably demonstrate the applicability of this same substance to the manufacture of many other useful articles, and they therefore agreed that if any such discovery should be made by any of them, and patents should be taken out in relation to the preparation and application of gutta-percha, or the manufacture of any articles therefrom, such patents should be the common property of them all. Now, it is plain that the discovery of the applicability of gutta-percha to any particular article or thing for which it had not previously been used, must necessarily include the discovery of the mode in which it might be so applied, otherwise the discovery would be useless, or rather

¹ See Kerr Inj. 412, 413.

would be no discovery at all. If, for instance, in the patent for improvements in boots, gaiters, and other articles of apparel, the patentee had merely stated in his specification that he claimed as his invention the application of gutta-percha for making shoes, such a specification would clearly have been bad; it would have given no information at all, it would not have disclosed the real invention, which was not merely a discovery that gutta-percha might be used as an article in the manufacture of shoes, * but also a discovery of the mode in which the object might * 404 be accomplished. Indeed, on looking at the specifications of the patents clearly included in the agreement, it appears that they all, or almost all, describe as part of the invention the machinery by which the proposed manufacture is to be accomplished. This is the case in Brooman's patent of the 27th March, 1845, Bewley's of the 4th September, 1845, and Hancock's of the 15th May, 1846, which, though of course not included in the agreement of the 31st May, 1845, having been granted subsequently to that date, is yet recognized and treated by all the parties to the deed of the 2d October, 1846, including C. Hancock himself, as being a patent to which the provisions of the prior agreement were meant to apply. The same observation is applicable to Hancock's patent of the 10th February, 1847, the cost of which, though it was taken out by him, was defrayed by the plaintiff pursuant to the terms of their agreement. I think, therefore, that the defendant's patent of the 29th July, 1848, cannot be treated as not being comprehended in the agreement of the 31st May, 1845, merely because it specifies the machinery whereby, and the process by which, the result is to be obtained.

The defendant, however, contends that his patent is not within the agreement, because it is not a patent for the application or manufacture of gutta-percha, but of plastic substances generally. This, however, is a distinction which it is impossible to sustain. The discovery had relation to the application and manufacture of articles from gutta-percha, though it may be that it also had reference to the application and manufacture of articles from other substances also. So far as it relates to gutta-percha it is within the agreement, and so far as it relates to any other substances, the defendant's rights are saved by the decree. As, therefore, I am satisfied that the patent * of the 29th July, 1848, was * 405 within the provisions of the agreement of the 31st May,

1845, it follows that the defendant had no right, without the plaintiff's consent, to diminish or alter the extent of that patent by disclaiming any part of it, and the decree therefore properly restrains him from so doing. That disclaimer would in effect throw open to the public the use of the spinning machine invented, or at all events perfected by Hancock for the benefit of the plaintiff under the retainer of the 24th September, 1846.

The decree then orders C. Hancock to assign the patent to the trustees, who were to hold it on the trusts specified in the agreement. It was objected that this was a course which the Court ought not to take, for that partly from the loose way in which the original trusts were declared, and partly from the complications subsequently introduced by the various deeds and instruments executed by the parties, it will be impossible to say what are the precise trusts now affecting the patents; and the case was attempted to be likened to a suit for specific performance, where the Court, it was said, will not interfere to decree a conveyance unless the plaintiff is willing and offers as the price of the relief asked to do what the Court may think just on his part, and unless the Court sees that the trusts on which it is asked to direct a conveyance are such as it will be possible to execute. I can give no weight to these arguments. This is in no fair sense a suit for specific performance; its object is not the performance *in specie* of a legal contract in lieu of an action for damages, but the execution of a trust. The proposition of the plaintiff is that the defendant C. Hancock, for valuable consideration, agreed that all patents which he should take out for the manufacture of a particular article

should be the common property of himself and others on
* 406 certain terms agreed on among * themselves, and that he

has taken out a patent for an object within the terms of the agreement, and of which, therefore, he is a trustee for the parties interested under the agreement. Assuming the plaintiff to have made out, as I think he has made out, this proposition, the consequence follows that the defendant is bound to assign the patent of which he has thus become trustee to the trustees selected by the parties, that is, by the *cestuis que trust*. As to the suggestion that it is impossible to know what the trusts are (which, however, I do not feel to be the case), the answer is that the trusts are those to the creation of which the defendant was a party, and for agreeing to which he received from the plaintiff a valuable pecuniary consid-

eration, besides the joint interest in the patents of the other partners. The decree, therefore, was quite correct in directing the assignment of the patents to the trustees of the deed of the 21st January, 1846.

The liberty reserved to the parties to come in under the decree and make proposals for working the patents was, perhaps, hardly warranted by the pleadings; but it was obviously introduced for the convenience of the defendant Hancock himself, and I cannot regard it as affording him any ground of complaint.

The only other direction in the decree relates not to the patent of 1848, but to the patent of the 15th May, 1844. The defendant Hancock has, it seems, advertised himself as having the sole right under that patent of manufacturing gutta-percha, or articles composed therefrom; and the decree restrains him from continuing so to do, and, as I think, rightly. The plaintiff had, under the agreement of the 4th April, 1845, a clear right to manufacture corks from gutta-percha, and the long list of patents taken out by the four patentees in partnership, * leaves no doubt that * 407 the contract of the 31st May, 1845, to which Hancock was a party, was intended to give to the parties to that contract the right not only of manufacturing articles from gutta-percha, but of preparing and improving gutta-percha itself, so as to make it more capable of being used in manufactures; indeed, many of the patents expressly relate to improved modes of preparing the substance itself and fitting it for manufacturing purposes. Hancock, therefore, had no right thus to endeavour to deter others from dealing with the plaintiff in respect of an article as to which he had by contract acquired a perfect right to deal, if he thought fit so to do.

The decree is thus right in all its parts: it properly declares that the letters-patent of the 29th July, 1848, together with the other patents taken out after the execution of the deed of the 21st January, 1846, were subject to the original agreement of the 31st May, 1845: it properly orders the defendant C. Hancock to assign those letters-patent to trustees to be appointed under the deed of the 21st January, 1846: it properly restrains C. Hancock from prosecuting his application for a disclaimer and alteration of parts of the specification of what was in truth not his property: it properly restrains him from granting licenses under the patents obtained since the 21st January, 1846, for though not included in the deed

of that date they were still subject to the prior agreement of the 31st May, 1845, in pursuance of which that deed was executed, and ought, therefore, to be assigned on the trusts therein contained; and, finally, it properly restrains him from holding himself out by advertisement as having the sole right of manufacturing gutta-percha and articles made thereof, in violation of his express
 * 408 contracts with the plaintiff. * The appeal, therefore, was wholly unwarranted, and must be dismissed with costs.

May 24.

In carrying out the decree made in pursuance of the above decision, a question arose in reference to the form of the assignment by the defendant C. Hancock to the trustees, of the letters-patent of the 29th July, 1848. The defendant alleged that the patent was used by him for other purposes than gutta-percha, and that it was most important to him to have power to grant licenses and to stop persons infringing upon his rights. He therefore proposed to insert the following clause in the assignment: —

“ Provided always, and it is hereby agreed and declared between and by the parties hereto, that nothing herein contained shall be deemed to deprive the said Charles Hancock of the exclusive right to the benefit of the said letters-patent of the 29th day of July, 1848, in their application to any substances other than gutta-percha or gutta-tuban or any substances which may serve as a substitute for gutta-percha or gutta-tuban, or which may be combined therewith excepting caoutchouc or such other substances as are already known and in general use. And it is hereby agreed and declared that it shall be lawful for the said Charles Hancock, his executors, administrators, and assigns, to use the names or name of the trustees or trustee for the time being of the agreement of the 31st day of May, 1845, and the indenture of the 21st day of May, 1845, and the indenture of the 21st day of January, 1846, in any suit or action relating to the application of the said letters-patent of the 29th day of July, 1848, to any substances other than as
 * 409 aforesaid. And it shall also be lawful for * the said Charles Hancock, his executors, administrators, and assigns, to call upon the said trustees or trustee for the time being to grant, and they and he are and is required to grant, such license or licenses for the application of the said letters-patent to any substances other

than as aforesaid to such person or persons or body or bodies corporate as the said Charles Hancock, his executors, administrators, and assigns, may direct."

The plaintiff insisted that the insertion of any such clause was inconsistent with the decree. On the matter being brought before the Vice-Chancellor STUART, first in chambers and subsequently in Court, his Honor agreed in the view taken by the plaintiff, and dismissed a specific motion made by the defendant for the insertion of the clause proposed. The matter was then brought by way of appeal before the Lord Chancellor.

Mr. Malins and *Mr. G. M. Giffard*, for the defendant.

Mr. Bacon and *Mr. Stiffe*, for the plaintiff.

Mr. C. Simpson appeared for other parties.

THE LORD CHANCELLOR. — I do not think that I have authority to declare in any way what the right of Mr. Hancock in this patent is. All that the assignment can do, according to the rules of the Court and the principles of justice, is to give effect to the declaration contained in the decree. What the decree has established is, that a certain patent which was taken out by Mr. Hancock is, as to certain substances to which it might be applicable, within the terms of a previous agreement which he had made in the year 1845, and which bound him to bring it into partnership, and the decree so declares accordingly. As, however, * the patent * 410 was or might be applicable to other substances besides those which formed the subject of the previous agreement, the decree says, that the declaration, as to the obligation to bring that patent into the common stock, is "to be without prejudice to any question as to any right of the defendant Charles Hancock to the benefit of the letters-patent of the 29th of July, 1848, in their application to any substances other than gutta-percha."

But it is said, that, if the assignment of the patent is made declaring the trusts of the patent so far as relates to gutta-percha, and leaving the rest vague, there will be a door opened for future litigation. That may be so, but it is the necessary consequence of the decree; and if the decree ought to have closed that door (I do not mean to intimate that it ought, and I do not think such a

question was raised upon the pleadings), it has not done so, and the objections made are made to the terms of the decree, and not to the proposed form of the assignment.

At the same time I do not think that the assignment goes as far as it ought to go ; and I think Mr. Hancock is entitled to the proviso to this extent: I think it should stand thus,—“ Provided always, and it is hereby agreed and declared between and by the parties hereto, that nothing herein contained shall be deemed to deprive the said Charles Hancock of any right in equity to the said letters-patent of the 29th of July, 1848, in their application to any substances other than gutta-percha or gutta-tuban or any substances which may serve as a substitute for gutta-percha or gutta-tuban or which may be combined therewith excepting caoutchouc or such other substances as are already known and in general use ; ” there, I think, the proviso must stop.

1856. January 11, 12, 18. Before the Lord Chancellor Lord CRANWORTH.

A testator, after directing payment of all his debts, devised the residue of his freehold and copyhold estates to trustees, upon trust to sell and absolutely dispose of the same, and he directed the moneys to arise from such sales should be deemed to be part of his personal estate, and that the rents and profits of the hereditaments, till their sale, should be deemed to be part of the annual income of his personal estate, and that the same moneys, rents, and profits should be subject to the disposition thereafter made concerning his personal estate and the annual income thereof respectively ; and as touching his personal estate, he bequeathed the same to the trustees, upon trust to invest the same in consols and pay certain legacies. The testator made no disposition of the residue of his estate: *Held*, impugning the authority of *Chitty v. Parker* (4 Bro. C. C. 411), and approving that of *Roberts v. Walker* (1 Russ. & M. 752), that the real and personal estate was constituted a blended fund, and applicable, *pari passu*, in payment of debts and legacies: ¹ *Held*, also, that the heir was not entitled to an inquiry as to the relative value of the real and personal estates, with a view to ascertain the amount for which he was liable to contribute, but that a sale of such real estate must be made.

¹ See 2 Jarman Wills (3d Eng. ed.), 592-594.

THIS was an appeal from the decree of the Master of the Rolls, reported in the 21st volume of Mr. Beavan's Reports, p. 37.

The testator, Lewis Rose, after directing payment of all his debts, devised the residue of his freehold and copyhold estates to trustees, their heirs and assigns, upon trust, as soon as conveniently might be after his decease, to sell and absolutely dispose of the same; and the testator directed that the moneys to arise from such sale should be deemed to be part of his personal estate, and that the rents and profits of the hereditaments, till their sale, should be deemed to be part of the annual income of his personal estate, and that the same moneys and rents and profits should be subject to the dispositions thereafter made concerning his personal estate and the annual income thereof respectively. And as touching his personal estate, he bequeathed the same to his said trustees upon trust to invest the same in consols and pay certain legacies; and he appointed the trustees his executors.

* The testator died in 1858. The question which arose * 412 between the heir-at-law and next of kin was, whether, upon the construction of the testator's will, the debts and legacies were to be paid primarily out of the personal estate, or out of the real and personal estate ratably, as a common fund.

The Master of the Rolls having held that the real and personal estate was blended and applicable, *pari passu*, in payment of the debts and legacies, the heir-at-law now appealed to the Lord Chancellor.

Mr. Daniel and *Mr. E. F. Smith*, in support of the appeal. — 1st. It is submitted, that the personal estate of the testator is primarily liable for the payment of his debts and funeral and testamentary expenses, the testator having, in the first clause, directed payment of his debts. It is true that the will afterwards directs a sale of the real estate for the purpose of forming a common fund; but it is to be observed that the destination of that blended fund is to be subject to the dispositions thereafter made concerning his personal estate, and there was no subsequent disposition for payment of debts. The charge, therefore, at the commencement of the will, on the real estate, will only make that estate an auxiliary fund, for, as observed by Lord ELDON, in *Bootle v. Blundell*, (a) "I take it to be certain, also, that it is not enough for

(a) 1 Mer. 193; see p. 220.

the testator to have charged his real estate with, or in any manner devoted it to, the payment of his debts; that the rule of construction is such as aims at finding, not that the real estate is charged, but that the personal estate is discharged;” and on similar

* 413 grounds * the House of Lords decided the case of *Boughton v. Boughton*. (a)

2d. With respect to the legacies, there can be no doubt but that until, comparatively speaking, a recent time, where real and personal estate were given to pay legacies, &c., and the personal estate was sufficient to pay, then there was no equity in the next of kin to have the real estate sold for their benefit. *Chitty v. Parker*, (b) *Ackroyd v. Smithson*. (c) In *Robinson v. Taylor*, (d) Lord THURLOW says: “The general rule is, that where property is given for particular purposes in trust, nothing more is subject than those purposes require; and if not exhausted, there shall be a resulting trust for the residue, after the purposes are answered, as to the real for the heir-at-law, as to the personal for the personal representative. *Ackroyd v. Smithson* differs from this case, for there the whole of the testator’s property, both real and personal, was disposed of; and the residue arose only by lapse upon the death of some of the legatees. But this is claimed upon the particular words of the will. Here the personal estate would have been sufficient without the aid of the real; and in that case I think it would be very hard to take it from the heir-at-law. In my opinion, there is a mighty difference between a residue arising from lapse and such a residue as this.” The first time these authorities were impugned was by the case of *Roberts v. Walker*, (e) but that was only the decree of the Master of the Rolls; and it is to be observed, that the case of *Robinson v. Taylor*, (d) was not cited

in *Roberts v. Walker*, and the latter case does not affect the
* 414 first point as to debts. It is well established, * that a mere direction to sell real estate does not amount to a direction to convert it out and out. In *Shallcross v. Wright*, (g) Lord LANGDALE evidently does not approve of the decree in *Roberts v. Walker*; and in the *Attorney-General v. Southgate*, (h) Sir L. SHADWELL said: “I consider that Sir JOHN LEACH’s decision in *Roberts v.*

(a) 1 H. L. Cas. 406.

(b) 4 Bro. C. C. 411.

(c) 1 Bro. C. C. 504.

(d) 1 Ves. Jr. 44.

(e) 1 Russ. & M. 752.

(g) 12 Beav. 505.

(h) 12 Sim. 77; see p. 82.

Walker is contrary to the ordinary rule of this Court as observed in the administration of assets." True it is that Lord LYNDHURST, on appeal, reversed the decree of the Vice-Chancellor in *Attorney-General v. Southgate*, (a) but in that case the residue was disposed of; which fact, in the opinion of Lord THURLOW in *Robinson v. Taylor*, (b) made "a mighty difference."

[The Lord Chancellor referred to *Cogan v. Stevens*. (c)]

In *Blann v. Bell*, (d) the Vice-Chancellor PARKER, referring to the authority of *Roberts v. Walker*, says: "It was the first authority of the kind, and, perhaps, it does not quite agree with the other cases."

They also referred to and commented on *Tench v. Cheese*, (e) *Phillips v. Phillips*, (g) *Taylor v. Taylor*, (h) *Berry v. Usher*. (i)

3d. We submit that, as even in the case of *Roberts v. Walker*, (k) there was an inquiry to ascertain the relative values of the real and personal estate, and as it is clear that stock would not be required to be sold in order to ascertain its value, so in the present case there is no necessity for a sale of the real estate, the value of which may, with equal facility, be estimated.

Mr. Lloyd and *Mr. G. Russell*, for *A. Rose*, one of the defendants, and next of kin. — The question is one of intention only, and, looking at * the whole will, it is clear that the * 415 testator contemplated the payment of his debts and legacies *pari passu*. The present case is distinguishable from *Bootle v. Blundell*, (l) because in that case there was a question whether the real estate was or not primarily liable. The only ground relied on by the appellant for impeaching the authority of *Roberts v. Walker* (k) was, that *Robinson v. Taylor* (b) was not cited; but the question of apportionment never arose in *Robinson v. Taylor*, and of course it was not cited. In *Boughton v. Boughton*, (m)

(a) 12 Sim. 77, see p. 82.

(b) 1 Ves. Jr. 44.

(c) 5 Law J., Ch. (N. S.) 22.

(d) 5 De G. & Sm. 658.

(e) 19 Beav. 3.

(g) 1 Myl. & K. 649.

(h) 3 De G., M. & G. 190.

(i) 11 Ves. 87.

(k) 1 Russ. & M. 752.

(l) 1 Mer. 193.

(m) 1 H. L. Cas. 406.

there was no direction to blend the funds. Here, however, the testator has expressly directed a conversion out and out, and the proceeds to form a blended fund, and in such a case it is not necessary that there should be an express exoneration of the personalty: *Roberts v. Walker*, (a) *Attorney-General v. Southgate*, (b) *Hopkinson v. Ellis*, (c) *Shallcross v. Wright*, (d) *Young v. Hassard*, (e) *Robinson v. The Governors of the London Hospital*, (g) *Cradock v. Owen*. (h) As to there being no necessity for a sale of real estate, it is to be observed that the bill prays for the execution of the trusts of the will, and that will directs a sale; besides, it is the only way of ascertaining the value of the estate.

Mr. R. Palmer and *Mr. Hughes*, for another of the next of kin, cited *Johnson v. Wood*.(i)

Mr. Lewin, for the trustees.

Mr. E. F. Smith, in reply. — The distinction between the * 416 present and the cases * relied upon by the respondents is, that in each of those cases the trust to pay the debts was after the sale and conversion, here the trust is before.

THE LORD CHANCELLOR. — The question I have to decide is, whether the direction in the will, that the trustees should sell and absolutely dispose of the testator's freehold and copyhold estates, and that the moneys arising therefrom should be deemed to be part of his personal estate, amounts to a direction that the money produced by the sale shall be applied ratably with the personal estate in payment of the testator's debts and legacies. Now, the cases of *Boughton v. Boughton* (k) and *Tench v. Cheese* (l) have decided that a mere charge of debts and legacies on real estate does not constitute it a mixed fund, but that in such a case the real estate can only be regarded as an auxiliary fund. The question, however, before me is, whether that doctrine is applicable to a case like the present, where there is not simply a common charge

(a) 1 Russ. & M. 752.

(b) 12 Sim. 77.

(c) 10 Beav. 169.

(d) 12 Beav. 505.

(e) 1 Jo. & Lat. 466.

(g) 10 Hare, 19.

(h) 2 S. & G. 241.

(i) 2 Beav. 409.

(k) 1 H. L. Cas. 406.

(l) 19 Beav. 3.

on the real and personal estate of the testator, but where he has given positive directions for the sale of his real estate, and that the proceeds shall be blended with and deemed to be part of his personal estate. In the case of *Roberts v. Walker*, (a) it was decided by Sir JOHN LEACH, that where a testator had created a mixed general fund from real and personal estate, and directed the fund to be applied in payment of debts and legacies, there the real and personal estate must contribute, in proportion to their relative amounts, to the payment of the debts and legacies. It was, however, urged by the appellant that, assuming that decision to be correct, still that there was a clear distinction between that case and the present, because in the latter the testator intended something more by his having commenced * his will with a * 417 direction for payment of all his debts. I do not think that makes any difference. This case appears to me to be quite within the authority of *Roberts v. Walker*, (a) which has been acted upon for upwards of twenty-five years; it would be dangerous to disturb a doctrine so settled, and even if I had less doubt than I have of the propriety of that decision, I should be prepared to abide by its authority. I do not think that the testator meant any thing by the expression, that the money, the proceeds of the sale, was to be subject "to the disposition thereafter made concerning his personal estate." Those words, I think, are merely tautological. The result of my opinion is, that the Master of the Rolls has arrived at a correct conclusion, both as to the debts and legacies.

With regard to the direction to sell the real estate, I am sorry to say that I think the Master of the Rolls also right in the construction which he has put upon that part of the will, because the testator has himself directed a sale. The authorities cited as to how the residue is to go have no application. I shall not finally dispose of this case to-day, but unless I give another judgment before the end of this term, it may be understood that I fully concur with the Master of the Rolls.

January 18.

THE LORD CHANCELLOR. — Since this case was last before me, I have looked into the authorities. In the first instance, I may observe that it appears to me that the case of *Roberts v. Walker* (a)

(a) 1 Russ. & M. 752.

has been so frequently acted upon, that I must regard it as an authority conclusively established. With respect to the other authorities which were cited, the most important is that of the *Attorney-General v. Southgate*, (a) in 1841, because on * 418 appeal the decision of the Vice-Chancellor * was reversed, and the authority of *Roberts v. Walker* (b) recognized and approved. In that case there was a devise of all the testator's real and personal property to trustees to sell, and on receipt of the moneys to arise by sale of the whole property, to deposit the same in the Bank of England, to form a fund out of which to pay debts, and then to distribute the residue as thereafter mentioned; then the testator gave several legacies and then the residue to the Cordwainers' Company for charitable purposes; and it was held by Lord LYNDHURST, on appeal, that the real estate was to bear a share of the debts and legacies. The next case was that of *Salt v. Chattaway*, (c) also in 1841, where there was a devise of real estates to trustees, to be sold, and out of the produce and the testator's ready money to pay legacies and to dispose of the residue as thereafter mentioned, and Lord LANGDALE held that the real estates were to bear a share. That was followed by the case of *Stocker v. Harbin*, (d) also in 1841; there there was a devise of all real and personal estate to trustees in trust to sell and to stand possessed of the moneys, first to pay debts, then to pay 1000*l.* to a legatee. By an unattested codicil the testator revoked this legacy of 1000*l.*, and died in 1834; and it was held, that the legacy was in fact charged on real estate, and as to that the revocation was bad. Then came the case of *Hopkinson v. Ellis*, (e) where the testator devised real and personal estate to trustees to sell, and by and out of the moneys to pay legacies, including some to charities; and it was held that the realty was charged with part. In *Shallcross v. Wright*, (g) the devise was on trust to sell and stand possessed of the proceeds as part of the testator's personal estate, and * 419 there was a bequest of the personal estate to pay * debts and legacies, and to pay the residue of the trust-moneys as he should by codicil direct. The testator made no codicil, and it was held that the debts and legacies were apportionable. So in

(a) 12 Sim. 77.

(b) 1 Russ. & M. 752.

(c) 3 Beav. 576..

(d) 3 Beav. 479.

(e) 10 Beav. 169.

(g) 12 Beav. 505.

Robinson v. The Governors of London Hospital, (a) there was a devise of real estates to trustees to sell, and the money arising thereby to be, to all intents and purposes, part of the testator's personal estate; there, too, it was held that the real estates were to bear a share. It was attempted to be argued that the testator (though in this case the language was stronger) at all events intended the proceeds of the real estate to be applied in like manner as the personalty with reference only to the legacies; but if such a construction were adopted it would, in effect, be searching out little differences which were not appreciable by mankind in general, and which, in my opinion, in the present instance, constitute no grounds of distinction. I have looked also into the case of *Young v. Hassard*, (b) and I confess I have some doubts whether the decision in that case is consistent with that in *Boughton v. Boughton*. (c) With respect to the decision of Lord THURLOW in *Robinson v. Taylor*, (d) that does not appear to me to be at all in conflict with the series of authorities to which I have adverted; nor was the question even argued in the case of *Ackroyd v. Smithson*. (e) There remains only the case of *Chitty v. Parker*, (g) the report of which is so very loose that it cannot be regarded as an authority.

* *Re* ADAMSON'S PATENT.

* 420

1856. April 19. Before the Lord Chancellor Lord CRANWORTH.

A contractor for certain harbour works had in the progress of his undertaking invented an apparatus which greatly facilitated the works, but which could only be tested in a place accessible to the public. After having used the apparatus for four months in the progress of the works, he applied for a patent: *Held*, that such user amounted to a dedication to the public, and that he was not entitled to a patent.¹

In this case the petition stated that the petitioner Adamson was the first and true inventor of a travelling staging and crane or

(a) 10 Hare, 19.

(d) 1 Ves. Jr. 44.

(b) 1 Jo. & Lat. 466.

(e) 1 Bro. C. C. 503.

(c) 1 H. L. Cas. 406.

(g) 4 Bro. C. C. 44.

¹ See Curtis Patents, § 296 *et seq.*; *Hills v. London Gas Light Co.*, 5 H. & N. 311; *Spence's Patent, In re*, 3 De G. & J. 523.

jenny, adapted for building piers and other harbour works, and prayed that the letters-patent might be sealed. The application was opposed by the respondent Robinson, on the ground, first, that the petitioner was not the true inventor, but that Robinson was; and, secondly, that there had been such a publication of the invention, before the provisional specification was made, as to disentitle the petitioner to the patent. It appeared that the petitioner had a contract for the construction of a pier and breakwater at Hartlepool; that in the prosecution of the work in 1854, he had invented, and in May, 1855, perfected and applied an apparatus or framework, supporting the crane which was the subject of the patent. He first applied for the patent in September, 1855, and by his affidavits he stated that the invention had never been used by anybody but himself and his workmen, and that the delay in applying for the patent was to be attributed to the fact that it was impossible to test the efficacy of the invention except in rough weather or without its being exposed to the view of the public.

Mr. Cairns and *Mr. Drewry*, in support of the application. — We submit that the subject-matter of the invention must in all cases give the rule as to whether in maturing it there has or has not been a dedication to the public; here, from the very nature of the thing, there must have been a certain amount of publicity, otherwise the experiment of its efficacy could never have been made.

* 421 They * cited the following authorities: *Morgan v. Seaward*, (a) *Bentley v. Fleming*, (b) *Cornish v. Keene*, (c) *Minter v. Wells*. (d)

Mr. Bagshaw and *Mr. Hindmarch*, for the respondent, were not called upon.

THE LORD CHANCELLOR. — I cannot put the Great Seal to this patent, because I think there has been a clear dedication to the public. Cases may arise in which there may be a doubt as to whether an invention has or has not been made public. In the present instance, however, an invention has been made in the

(a) 2 M. & W. 544.

(b) 1 Car. & K. 587.

(c) Webster's Reports on Patents, 501.

(d) *Ibid.* 127.

progress of a work, and it has been used publicly by the inventor, not as an invention, but in the carrying on and execution of that work. I am not aware that in any similar case any such protection has been afforded to the inventor as is here asked. It was alleged by Robinson that he, and not the petitioner, was the true inventor; and if that had led to any additional costs, it might be to be considered, but in the circumstances of this case it is not necessary for me to give an opinion upon that point. The petitioner admits that he completed his invention in May, 1855, and that he used it publicly for upwards of four months before applying for the patent. No doubt an experiment might have been made, and if made *bond fide* only for the purpose of testing the merits of an invention, I do not think it would have amounted to a dedication to the public; but where, as in the present case, thousands of persons had the opportunity of seeing the apparatus at work for a period of four months, during the carrying on of the petitioner's contract and in the regular course of the undertaking, it is quite clear that no intention for applying for a patent originally existed; and under such circumstances, * and after the lapse of such a * 422 time, I must hold that there was a dedication to the public, and refuse the application with costs.

TOLSON'S PATENT.

1856. May 3, 31. Before the Lord Chancellor Lord CRANWORTH.

An application under the 2d section of the Act 16 & 17 Vict. c. 115, for the inspection of the provisional specification of certain letters-patent, on the ground that the subject-matter was the same as that for which the applicant had obtained a patent, refused.

Letters-patent sealed in a case where the evidence showed great similarity between the alleged invention and one for which a patent was already in force.

THIS was an application by Messrs. Schiskar and Calvert for a copy of the provisional specification of a patent sought by Mr. Tolson, "for giving metallic lustre to fabrics." The application was made under the 2d section of the Act 16 & 17 Vict. c. 115, whereby

it is enacted: "The commissioners shall cause true copies of all provisional specifications left at the office of the commissioners to be open to the inspection of the public, at such times after the date of the record thereof respectively as the commissioners shall by their order from time to time direct." The application was supported by an affidavit that the applicants had been in possession for the last three years of a patent for producing the same results, and his belief that such results could only be produced by similar means.

Mr. Webster, in support of the application. — The present applicants have, under the 12th section of the Act 15 & 16 Vict. c. 83, a right to oppose the grant of the patent; the proceedings are at such a stage as that it is too late to oppose before the law officer of the Crown, and no harm can result from the inspection, while it may save both parties incurring unnecessary expense hereafter in litigation, and before the patent can be sealed, inspection will be open to everybody.

Mr. Hindmarch, contra, referred to the 29th section of the Act 15 & 16 Vict. c. 83, as only providing an inspection "after * 423 the term of the provisional protection * has expired;" he submitted that the risk of exposing the specification at the present stage was very great, because if a person was about maturing an invention of a similar nature, he might avail himself of the most material part of the invention, for which a patent was now sought.

THE LORD CHANCELLOR. — What I am asked to do is in effect to lay down a general rule, that where a person has a *locus standi* to oppose the grant of a patent, in every such case he may require an inspection of the provisional specification. It has never been the practice of the Court to hand over the provisional specification to an opposing party, and I quite agree with Mr. Hindmarch, that it might be productive of the most dangerous consequences to a person about to obtain a patent, if every person who might possibly have a right to oppose should be entitled to require the production of the provisional specification. I shall, therefore, refuse this application with costs.

May 31.

On this day Mr. Tolson's petition, praying the sealing of his patent, came on to be heard.

Mr. Webster, on behalf of Messrs. Schiskar and Calvert, objected that the alleged invention of the petitioner was identical with that contained in their patent.

Mr. Hindmarch, for the petition, referred to *Ex parte Fox*. (a)

The Lord Chancellor said, that though there appeared to be a great similarity between the alleged invention of the petitioner and that for which the objectors had already obtained a patent, yet that, looking at the consequences of allowing or refusing the application, and inasmuch as by allowing it the legal rights of the parties would be wholly unaffected, he did not feel himself warranted in withholding the Great Seal.¹

1855. May 3, 7, 24, 31. Before the Lord Chancellor Lord CRANWORTH.

Where a person holding a fiduciary character purchases from his *cestui que trust*, and the sale is complained of, this Court imposes the burden of proof upon the purchaser to show that all due protection has been afforded to the vendor; *aliter*, where no such fiduciary relation subsists.³

Where, after the death of a vendor, the sale was impeached by his devisees on the ground that at the time of the sale he was an illiterate bed-ridden old man of seventy-one years of age, and had acted without independent profes-

(a) 1 V. & B. 67.

¹ Spence's Patent, *In re*, 8 De G. & J. 523.

² S. C., 8 H. L. Cas. 481.

³ 1 Story Eq. Jur. §§ 321-322 a; *Fox v. Mackreth*, *Pitt v. Mackreth*, 1 Lead. Cas. in Eq. (3d Am. ed.) 172 [92] *et seq.* 134; 2 Bro. C. C. 400 and cases in notes 425, n. (e); *Campbell v. Walker*, 5 Ves. 578, n. (a), by Perkins, and cases cited; 2 Sugden V. & P. (8th Am. ed.) 688 *et seq.* and cases in notes; *Lewin Trusts* (5th Eng. ed.), 359 *et seq.*; *Davoue v. Fanning*, 2 John. Ch. 252; *Michoud v. Girod*, 4 How. U. S. 503; *Holman v. Loynes*, 4 De G., M. & G. 270, and cases in n. (1).

sional advice, and had conveyed away the property in question of the value of 400*l.* for the consideration of a provision by way of board and lodging during his life, which only endured six weeks after the conveyance: *Held*, that in the absence of any fraud, and the evidence showing that he had declined to employ professional advice for himself, such a transaction was not impeachable on the ground of mere inadequacy of consideration.¹

THIS was an appeal by the defendant E. B. Guest from the decree of the Vice-Chancellor KINDERSLEY. The bill in this suit was filed by William and John Harrison, the devisees and personal representatives of John Hunt, who died in November, 1853; and the principal object of the suit was to set aside a sale and conveyance of certain copyhold property in October, 1852, by Hunt, six weeks before his death, to the defendant Guest. The bill stated that Hunt was entitled to the property in question, subject to a mortgage of 300*l.*, and that it was of the annual value of 40*l.* at the least; that for some years previously to his death (which happened on the 12th November, 1853) Hunt was in a weak and infirm state of health, and during three years immediately preceding that event his mental faculties were very weak, and that he was perfectly incapable of taking care of himself or his affairs; and that he employed a nurse, whose sole duty it was to attend on him; and that he was a yeoman, and illiterate. The bill alleged that towards the end of the month of September, 1853, the defendant Guest, the leading man of the parish, called upon Hunt, who was then of the age of 71 years, and was very ill and bed-ridden, and his dissolution was evidently fast approaching, and persuaded Hunt to go and live at the house of a

* 425 labourer in the *employ of the defendant, and occupying one of his the defendant's cottages, and represented to him that his comforts would be better attended to there than at the place where he was then residing, and promised to maintain and support him, and at the same time represented to him that he the defendant would pay off the mortgage debt, and be satisfied with the security of the copyhold estate for the mortgage debt, and

¹ 1 Sugden V. & P. (8th Am. ed.) 275, and notes; 1 Story Eq. Jur. §§ 236, 245, 245 *a*; Gwynne v. Heaton, 1 Bro. C. C. (Perkins's ed.) 6 n. (a), and cases cited; Osgood v. Franklin, 2 John. Ch. 1, 28; Seymour v. Delancey, 6 John. Ch. 222; Moth v. Atwood, 5 Ves. (Sumner's ed.) 845, n. (a), by Perkins, and cases cited.

what he should advance for the maintenance of Hunt; that Hunt, after much persuasion, yielded to the defendant's solicitations and agreed to his proposals; and on the 30th September, 1853, Hunt, in pursuance of what passed at the interview, was removed in a cart to the defendant's cottage, where he continued to reside till his death; that the defendant employed his own solicitor to draw the indenture by which the property was conveyed to him, and that on the 6th of October, 1853, the solicitor procured the execution thereof by the mortgagee and by Hunt. The bill then set out the indenture, which was dated the 6th October, 1853, and was made between the mortgagee of the first part, Hunt of the second part, and the defendant of the third part, whereby, in consideration of the sum of 313*l.* 15*s.* to the mortgagee paid by the defendant, at the request of Hunt, testified by his execution thereof, and of the further sum of 10*l.* to Hunt, on the execution thereof, paid by the defendant, and also in consideration of the covenants on the part of the defendant to be observed and performed, the mortgagee, at the request and by the direction of Hunt, did grant, release, assign, and assure, and confirmed unto the defendant the premises in question. And the defendant did thereby for himself, his heirs, executors, and administrators, covenant with Hunt, his executors and administrators, that he, the defendant, his executors or administrators, should and would from thenceforth, from time to time, and at all times during * the continuance of the natural life of Hunt, provide him * 426 with good, sufficient, and suitable meat, drink, board, and lodging, and washing and attendance; and, moreover, that in case the defendant should at any time thereafter neglect or refuse to provide Hunt with sufficient and suitable meat, drink, board, lodging and washing, and attendance, then and in such case the defendant should and would pay or allow unto Hunt the sum of twelve shillings per week, in lieu of providing him with meat, drink, board, washing, lodging, and attendance as aforesaid: provided always, and it was thereby declared and agreed, that nothing therein contained should extend or be construed to extend to enforce any obligation upon the defendant, his executors or administrators, to supply Hunt with medicine or any other extra attendance in the case of sickness, or with wine or spirits; neither should the defendant, his executors or administrators, be in any wise liable for any funeral expenses incurred in burying Hunt,

any thing thereinbefore contained to the contrary thereof in any wise notwithstanding.

The bill then alleged, that in the transaction above detailed Hunt was entirely without advice or assistance, professional or otherwise, except so far as the defendant himself pressed his own advice on Hunt; that Hunt had, for many years, employed an attorney, which fact was well known both to the defendant and his solicitor; and that neither the defendant nor his solicitor requested Hunt to appoint a solicitor or attorney or friend to act in the matter on his behalf; that the indenture was not read over or explained to Hunt, and he was not aware of the effect thereof; and that he considered he was executing a mortgage to secure what should be expended upon him for his maintenance; and that, as is usual in the case of mortgage transactions, and unusual in

the case of transactions of purchase and sale, he, Hunt,
* 427 bore the * costs of the transactions, which amounted to

9*l.* 18*s.* 4*d.*, which sum the defendant paid to his solicitor, and afterwards charged Hunt therewith. The bill then alleged that the business was hurried over with the most extraordinary haste; that no abstract of title was prepared, nor any contract in writing as is usual in the purchase of landed property; and the defendant, in his eagerness to get the title-deeds into his possession, did not even take an opportunity of inspecting them, but paid off the mortgage without knowing any thing about the title.

The bill alleged that the property was at the date of the indenture of the value to be sold of 700*l.* at the least; and after stating that on the 12th November, 1853, a few weeks after the date of the indenture, Hunt died, prayed that the indenture might be declared null and void and for a reconveyance, or that the indenture might be declared to stand for a security only for the advances made by the defendant on Hunt's behalf.

The defendant admitted that he had, for some years previously to 1853, been desirous of purchasing the property in question; and that he had frequently applied to Hunt, who had refused; that some time in August, 1853, Hunt sent for him and offered the property to him, saying, "I should like to have the parlour at the Yew Tree (a farm-house belonging to the defendant), if you will find me a bit and a drop as long as I live (I shall not want much), and some one to look after me, I will make over the place to you;" and that he then urged the defendant to get the business

concluded as quickly as possible. The defendant positively denied all the allegations in the bill from which fraud might be inferred. On the occasion of the second interview which * he * 428 had with Hunt, who was in bed, the defendant stated that he asked Hunt whether he had made up his mind to the terms he formerly stipulated for, and upon being answered in the affirmative said to him, "I will let you have the parlour of the Yew Tree and board and lodging and attendance, but I will not find you in medicine or medical attendance, nor wine nor spirits, nor bury you." With respect to the clause in the deed substituting the weekly payment of 12s. in lieu of board and lodging, the defendant stated that it was introduced by his solicitor as a security for Hunt. It appeared by the evidence of the solicitor that the deed was carefully read over and explained to Hunt before his execution of the conveyance; and that he was advised to employ another solicitor to act for him, which he declined.

With regard to the state of Hunt's mental faculties, there was a good deal of conflict in the evidence. Some witnesses representing him as in an infirm and at times a childish condition, and others representing him as having been in a vigorous state of mind. The result of the evidence appears to have been that he was naturally a person of shrewdness, and that though in his 71st year, and suffering greatly from bodily infirmity, his mind was in such a state at the time of the execution of the conveyance, as that the transaction could not have been impeached on the ground of mental incapacity.

By the decree of the Vice-Chancellor KINDERSLEY, it was declared that the indenture of the 6th October was fraudulent and void as an absolute conveyance; that the estate and interest thereby conveyed ought to stand as a security for the amount advanced by the defendant in satisfaction of the mortgage with the interest. Inquiries were directed as to the sums expended by the defendant in furnishing Hunt with meat, drink, lodging, washing, * and attendance, and an account of sums laid out in neces- * 429 sary repairs, and an account of the rents and profits, and the defendant was to be charged with an occupation rent; and it was ordered that the sums due on account of the several rents be deducted from the sum found to be due to him on the other account; and the defendant was ordered to pay the costs of the suit up to the hearing.

The Vice-Chancellor, in giving judgment, said he exonerated the defendant from the intention of concocting a fraud; but that the conduct of the defendant was, at least, very imprudent and improper, and having regard to the fact that Hunt had no independent professional assistance, that the transaction was one which, in a Court of Equity, must be regarded as fraudulent and void. The defendant now appealed to the Lord Chancellor.

The petition of appeal submitted that the Vice-Chancellor ought not to have declared that the indenture of the 6th October, 1853, was fraudulent and void as an absolute conveyance, or to have made any of the declarations, or to have given any of the directions consequent on such declaration; and the petition prayed that so much of the said decree as was therein particularized might be reversed. The defendant's counsel was about to open the appeal, when

Mr. Swanston and *Mr. Shapter*, for the plaintiffs, claimed the right to begin, as it was substantially an appeal from the whole decree: *Lees v. Nuttall*; (a) but the Lord Chancellor decided that the appellant ought to begin.¹

Mr. Baily, *Mr. Glasse*, and *Mr. Elderton*, for the defendant, in support of the appeal. — In the present case Hunt has had * 430 the benefit of the * contract and of all he stipulated for up to the day of his death; and unless there is positive evidence of fraud, the transaction cannot be impeached. Mere inadequacy of consideration is immaterial: *Wilde v. Gibson*; (b) here there has been not only no evidence on the part of the plaintiffs of any fraud, which must be established before they can succeed, but the allegations to that effect in the bill are positively negatived and disproved: *Ferraby v. Hobson*, (c) *Glascott v. Lang*, (d) *Price v. Berrington*, (e) *Maguire v. O'Reilly*. (g)

Mr. Swanston and *Mr. Shapter*, for the plaintiffs, in support of the decree of the Vice-Chancellor. — Admitting that a sale at an undervalue alone is not sufficient ground for setting aside a con-

(a) 2 Myl. & K. 819.

(d) 2 Phil. 310.

(b) 1 H. L. Cas. 605.

(e) 3 Mac. & G. 486.

(c) 2 Phil. 255.

(g) 3 Jo. & Lat. 224.

¹ See *Fisher v. Brierly*, 1 De G., F. & J. 643.

tract after its completion, yet where, as in this case, the person who has sold at the undervalue is illiterate, and has had no professional assistance, and has not received the fullest information as to the nature and effect of the transaction, it cannot be supported in this Court. Moreover, it is proved that the agreement, as drawn out, varied from the terms which had been verbally arranged between the parties, by the substitution of the money payment as liquidated damages in lieu of the agreement to supply board and lodging: *Atkyns v. Kinnier*, (a) *Astley v. Weldon*, (b) *Street v. Rigby*; (c) and the deed contains an untrue recital as to the actual receipt of a portion of the consideration, which *per se* is enough to invalidate the transaction. This bill does not rely on charges of fraud only, though the evidence discloses what amounts to fraud in this Court. The bill charges great haste and imprudence * on the part of the defendant, and a misunderstanding of * 431 the case on the part of Hunt is clearly established.

With respect to the objection that the plaintiffs were bound to prove the fraud as alleged, they referred to *Espey v. Lake*, (d) *Reynell v. Sprye*, (e) and to the following observations of Lord COTTENHAM in *Archbold v. The Commissioners of Charitable Bequests for Ireland*. (g) "I must, however, observe, as an opinion of mine has been referred to, to the effect that where bills allege matters of fraud, the Court must necessarily dismiss them, because fraud is not proved; that, of course, applies to cases where all the subsequent considerations depend on questions of fraud. But if fraud be imputed and other matters alleged, which will give the Court jurisdiction as the foundation of a decree, then the proper course is to dismiss so much of the bill as is not proved, and to give so much relief as, under the circumstances, the plaintiff may be entitled to."

Mr. Glasse, in reply.

THE LORD CHANCELLOR. — The bill in this case is filed to set aside a conveyance of a small copyhold property, upon the ground that it was obtained by means which this Court considers as fraudulent. The main fraud suggested in the bill is, that Hunt thought he was

(a) 4 Exch. 776.

(b) 2 Bos. & Pul. 346.

(c) 6 Ves. 815.

(d) 10 Hare, 260.

(e) 1 De G., M. & G. 660.

(g) 2 H. L. Cas. 440; see pp. 459, 460.

executing a mortgage only, and not an absolute conveyance. That is twice alleged in the bill. It is said, further, that there was a fraud, because Hunt was a man of imbecile mind; and not only that he had no professional adviser, but that the absence of professional advice was encouraged and promoted by the act of

* 432 the defendant, who is represented * to have forced the transaction upon Hunt. It is also said he had not that which he was to have had, namely, 100*l.* in money; and that the consideration which he in point of fact received, or had secured to him, was not properly secured, because the deed did not contain an absolute covenant to maintain him, but in the alternative, either to maintain him, or, if that should not be done, then to pay a certain small weekly sum, in lieu of such maintenance. The Vice-Chancellor proceeded upon the ground that the transaction was fraudulent, and one which ought to be set aside. Since this case was opened, I have looked at the judgment of the Vice-Chancellor, and I think I can collect the ground on which he proceeded; but not having quite satisfied myself that I have fully comprehended his views, I will not finally dispose of this case without attentively considering it; at the same time, I am bound to say that I cannot concur in some of the propositions on which he seems to have acted. If persons standing in a particular relation to one another deal as vendor and purchaser, the Court expects the purchaser, when the purchase is complained of by the seller, to show that the seller had due protection afforded him. Thus, if a guardian purchases of a young man his ward, although that relation may have ceased for a short time, so that the influence of the guardian may be supposed to continue, this Court expects that the guardian so purchasing will be able to show that due protection was given to the ward, and that the conveyance was rightly obtained. That is one illustration, and many others might be stated, as, for example, an attorney buying of or selling to his client. In short, wherever there is a fiduciary relation subsisting between vendor and purchaser, this Court throws the burden of proof upon the party who sets up the transaction against the person whom he was bound to protect. But I do not think that that doctrine extends to

* 433 the case of one person purchasing from * another when they are at arm's length, and where no such relation subsists. In such a case if a purchase has been obtained, and the person from whom it has been obtained seeks to set it aside, the burden

of proof is upon him to show that he has been imposed upon, and it is not for him to say, "I had no professional adviser," unless he can show there has been contrivance or management on the part of the person who was dealing with him, and whose transaction of purchase is sought to be set aside, to prevent him having that advice. The affairs of mankind could not go on if we were not to act upon some such ground of distinction.

What, in my opinion, influenced a good deal the mind of the Vice-Chancellor was this, that here the person selling his property sold it for a consideration, which turned out to be, and I should have thought upon the face of it was, a very meagre and inadequate consideration. The property sold was a small copyhold estate, which was represented as being of the value of between 600*l.* and 700*l.*, and it was subject to a mortgage for 300*l.*, on which a small arrear of interest was due; the mortgagee, moreover, was entitled to six months' notice before it could be called in. Now the seller was a person who, in point of fact, did not live for more than three months after the commencement of the treaty, and not six weeks after the actual conveyance, and what he took as the consideration was merely a covenant or agreement on the part of the purchaser, that he should have board and lodging, and a person always to attend him. The vendor was in a very infirm state of health, dropsical and suffering from sores in his legs. It is in evidence that he said to the defendant the purchaser, "I find myself very old, and all I care about is, that I should have a comfortable home for the rest of my life, and I will let you have the property if you afford that to me." It seems that the * de- * 434
fendant had been endeavouring often to purchase the property of him, I take it, at a fair price. There is no suggestion that he wanted to get it at an unfair price. The vendor in substance said, "I will not sell it to you upon any account for a pecuniary consideration, but you shall have it if you will agree to take care that I shall have a parlour (as he calls it, in a particular house) for the rest of my life, that I shall have some one to attend adequately to my wants in my unfortunate state of health, and that I shall be well kept, and that every thing I have shall come from your own table." In point of fact, he only lived a few weeks after the execution of the conveyance, the consideration, therefore, which he received, amounted in truth only in value to a very few pounds. The probable duration of his life, even if it had been a healthy

one, would only have lasted for a few more years, and inasmuch as the purchaser was to get the estate, which, after making allowance for interest on the mortgage and for repairs, yielded a surplus rent of about 15*l.*, it would seem to be a very inadequate consideration. I think, however, that it is but just to Mr. Guest (the purchaser), to say that I am not at all clear that he, or those whom he consulted, thought so, and I come to that conclusion from many considerations. In the first place, it is clear to my mind that he was anxious to have purchased, not upon the terms complained of, but upon paying a fair value for the estate, which the vendor would not listen to; and, secondly, because there had been a sort of stipulation that the purchaser was not to undertake to pay the expense of Hunt's funeral, nor for his wine or spirits, nor for his medicine, if he wanted any. Now that certainly looks, to my mind, as indicative of conduct which was, if you please, trying to drive a hard bargain, but not like the conduct of a man who was anxious to snap at any thing that might possibly be beneficial to himself. On

such an hypothesis it is hardly consistent to suppose he
 * 435 * would have made a stand upon such insignificant matters as those I have alluded to. The result was, that there was a purchase for what turns out to be an extremely inadequate consideration. That, however, is of no consequence, if the parties were in a situation to judge for themselves, and this makes the question as to the poor old man's state of mind, at the time he entered into this bargain, very material. Now, after looking at the evidence, I cannot entertain any very serious doubt that he perfectly understood what he was about, and, indeed, the Vice-Chancellor said, he did not at all attribute to him any thing like an imbecile state of mind, but, on the contrary, as was my impression, that he was rather a keen and cunning old man; that he felt he was not likely to live long, and did not care about any of his relations; probably it was entirely out of his recollection that twenty years before he had made a will in their favour. It is in evidence that he said he cared for nobody, all he cared about was (and I confess that it was a circumstance which struck me as somewhat material in showing the real nature of the transaction) the stipulation (which was not introduced into the deed) that he should have his food from Mr. Guest's table; that he should not be obliged to cater for himself; that he should have a particular room in Mr. Guest's cottage; and that he should supply him (according

to his expression) with "a bit and a drop," for the remainder of his life. On these terms Mr. Guest was to have the property. If upon the proposal being made, Mr. Guest had at once caught at it and bound Hunt down, as it were, without any professional advice, such a mode of proceeding would not be sanctioned in this Court: or if it had been proved that Hunt was a man incapable of making a bargain for himself, I should have set aside the transaction. But so far from finding any such reason for interfering, it is proved that Mr. Guest not only did not catch at the bargain, but *desired Hunt to take time to consider about it, and then *436 left the neighbourhood, and was absent for a fortnight.

On Mr. Guest's return, Hunt appears to have been anxious for the completion of the contract, and to have urged him to get the business finished without delay. He seems to have persevered in urging his original proposition, and at length Mr. Guest acceded to it. Now what is there in that indicative of a want of mental ability on the part of Hunt to enter into a contract, or what obligation was there on the part of Mr. Guest to do any thing to assist Hunt in making a good bargain? I have not been enabled to discover any ground for either position.

Nevertheless if the allegations in the bill are true, that at the time the deed was executed Hunt was studiously kept in ignorance of what he was doing, and still more if he was induced to believe he was doing something different from what he was doing, namely, if he supposed he was making a mortgage instead of conveying the estate away, that, however strong in mind he might have been, would be a ground to set the contract aside. I think, however, having attended to the evidence upon the subject, I must come to an entirely different conclusion. He certainly had no professional adviser of his own. That was his own act and his own determination, rather in the teeth of the remonstrances that were made to him. Having obtained all that he wanted, the conveyance, in truth, was his security. When I say that was his security, there may be a doubt whether the terms of the deed were perfectly well adapted for securing all that he was intended to have, but I agree with the observation that that is no ground for setting aside the transaction, still less for setting it aside as being fraudulent. If the parties had misconceived the effect of what they were doing, it might have afforded very good ground for rectifying the deed.

The act of God has made that perfectly unnecessary, and
 * 437 * there is now nothing to rectify; but there is no ground
 whatever for setting aside the deed upon the suggestion
 that there was any fraud.

I come to the conclusion, therefore, that there is no evidence showing that Hunt thought that this transaction was not what it was, or that he did not fully understand the effect of the act he was engaged in. I think it clear that he did distinctly know what he was doing; that he did not think it was a mortgage, but that he knew it was a conveyance, and that he meant it should be a conveyance. Then it is suggested, however, that part of the terms of the contract was that he was to have a sum of money, and that was never given to him; there is no evidence of that in the cause to lead me to such a conclusion. I think the evidence is clear that he was never to have had any thing more than what he had, namely, board, lodging, and maintenance,—maintenance from Mr. Guest's table,—for the rest of his days. The evidence shows that he only lived six weeks from the time when he was removed to the defendant's cottage: that was a very short time, but he might have lived a very long time. He seems to have been pleased with the change, and it appears that he was in a more cleanly and happy state, with more comforts about him. He had all that; and, unable as I am to discover any obligation on Mr. Guest's part to show that Hunt had more by way of consideration than he asked for himself, and unable as I am to discover any thing in the evidence for the suggestion that there was any endeavour to keep from him professional advice; on the contrary, being satisfied that there was, as far as there could be, a desire that he should have professional advice; that there was no imposition practised upon him; that he was left to form his own judgment; that no haste whatever was exhibited, but that, on the contrary, he was left to take his own time, and that he nevertheless persevered

* 438 * in his inclination, and perfectly well understood what he was doing, I confess I am unable to arrive at the conclusion to which the Vice-Chancellor has come. I think, therefore, that instead of the decree which was made, this bill ought to have been dismissed, but I think it ought not to have been dismissed with costs, for this reason; Mr. Guest's answer about the sum of money to be paid to Hunt, although the explanation is a very reasonable

one, was calculated to mislead, and if that had been otherwise stated, it is possible that the bill might not have been filed, or further proceedings, at least, might have been discontinued; and, under these circumstances, I think the bill ought to have been dismissed, nothing being said about costs. Inasmuch, however, as the bill also prays an account, to which the plaintiffs are entitled, I shall dismiss only so much of the bill without costs as relates to the setting aside of the transaction.¹ That will be my decree, unless on this day week I shall intimate, upon a reperusal of the Vice-Chancellor's judgment, that I see any cause to alter the opinion I have already expressed.

May 31.

I have carefully read through the evidence and the Vice-Chancellor's judgment in this case. There was no fiduciary character whatever existing between the vendor and the purchaser, and it also appeared that the vendor knew perfectly well what he was about at the time of the sale. The evidence satisfies my mind that he considered the bargain a very beneficial one for himself, and that he was resolved not to part with his property except upon the terms for which he had stipulated, namely, a maintenance in lieu of money. In my opinion, there was no imposition in the transaction, nor any feature in it which could justify the Court in setting it aside.

* JOHNSTONE v. BABER.

* 439

1856. August 8. Before the Lord Chancellor Lord CRANWORTH and the Lord Justice KNIGHT BRUCE.

A testator devised to trustees an advowson, in trust to sell upon the death of the then incumbent and to divide the proceeds between seven persons equally as tenants in common: *Held*, on the death of the incumbent, that the right to present was vested in the seven, and they not agreeing among themselves as to its exercise, that it must be determined by lot which of them should nominate the clerk to be then presented by the trustees.

THIS was an appeal from an order made by the Master of the Rolls, and the question to be decided was in whom the right of nomi-

¹ 1 Dan. Ch. Pr. (4th Am. ed.) 382.

nation of a clerk to the rectory of Culmington in the county of Salop was vested under the following circumstances.

Charles Johnstone, the testator for the administration of whose estate the suit was instituted, by his will, dated the 18th April, 1805, gave, devised, and bequeathed unto E. Baber, H. Lloyd, and J. F. Baxter all his real and personal estate upon trust as soon as conveniently might be after his decease to sell all his real estate with certain exceptions, and also his advowson of the rectory of Culmington and all his real estate in the parish of Culmington, and in like manner to sell his personal estate except as therein mentioned, and to stand possessed of the money to arise from such sales, after paying all costs and his the testator's just debts, in trust to provide an annuity of 200*l.* for his wife for her life, and to invest the residue and to divide it amongst his nine younger children in equal shares, except his son Charles who was to have 1000*l.* less than each of his brothers and sisters. And the will, after making provision for the time of payment of the shares and the disposal of the interest in the mean time, and declaring that the shares should become vested interests in such of his children as attained twenty-one, proceeded to direct, — as, for, and concerning all that the testator's advowson of the rectory of Culmington and all and singular his messuages, lands, tenements, and hereditaments situate, lying, and being within the parish of Culming-

* 440 ton, that they his said trustees or the survivors or * survivor of them, or the heirs or assigns of such survivor, should immediately after the decease of his son William Johnstone, of Skifton in the said county of Salop, clerk, absolutely sell and dispose thereof in such manner as he the said testator had thereinbefore directed touching the sale of other parts of his said real estates, and should after payment of the costs and charges attending such sale place out the clear residue thereof arising in their or his names or name in the three pounds per cent consolidated bank annuities, and pay and equally divide the same unto, between, and amongst all and every the child and children of his said son William in manner therein mentioned. And in case there should be no child or children of his said son William, then the testator willed and directed that the said trustees and the survivors and survivor of them, and the executors, administrators, and assigns of such survivor, should pay and divide the said clear residue of the last-mentioned trust moneys or the stocks or funds in which the

same should be invested unto, between, and amongst his said nine younger children, namely, Charles, John, George, Richard, Bempde, Catherine, Louisa, Jane, and Laura, in such parts, shares, and proportions, and at such ages, days, and times, and with such benefit of accruer and survivorship among them, as he had thereinbefore directed and declared touching and concerning their original fortunes or shares thereinbefore given and provided for them.

The testator died soon after making his will, leaving his nine children surviving; and the present suit was instituted for administering the estate as before mentioned.

William Johnstone, the eldest son of the testator, was, at the death of the testator, the incumbent of the rectory of Culmington, and so continued down to * his death, which took * 441 place on the 9th April, 1856; he died without having had any child or children, and without disposing by his will of any right he might have had as heir-at-law of his father to nominate to the next presentation of the rectory of Culmington; and he left his brother Charles Phillips Johnstone, the heir-at-law of the testator, his heir-at-law. Two of the testator's nine children died without obtaining vested interests in his property.

By the death of W. Johnstone, the rectory of Culmington became vacant, and the advowson of the rectory and the testator's property within the parish became salable under the provisions of the will. A question was then raised, in whom the right of nominating to the living was vested.

C. P. Johnstone contended that, according to the true construction of the will, the right of nomination did not pass by the devise of the advowson, but was vested in him as heir-at-law of W. Johnstone and of the testator, or, if it did pass so as to be vested in him jointly with the other younger children, then that there should be a partition of their rights and interests in the advowson and right of nomination, and that the right of nomination ought to be exercised according to seniority; and he presented a petition praying a declaration of right and directions accordingly.

In opposition to this claim, it was contended that the next presentation to the rectory passed by the will of the testator, and was vested in John Lloyd, the executor of the surviving trustee of the testator, for the benefit of the seven children, their representatives and assigns, and that the right of nomination to the living

was vested in the seven children, their representatives and
 * 442 assigns; * and a petition was presented by four of the
 younger children, — namely, Catherine Baugh, widow, formerly Catherine Johnstone; Louisa Elizabeth Parke, widow, formerly Louisa Elizabeth Johnstone; Jane Jennings, widow, formerly Jane Johnstone; and George Johnstone, — praying a declaration of right accordingly, and a reference to approve of a proper person to be presented to the rectory by J. Lloyd, and praying a sale of the advowson and lands, and a division of the proceeds among the parties entitled.

These two petitions came on to be heard together before the Master of the Rolls on the 2d August, 1856, when his Honor made an order, declaring that the right of presentation passed by the will of the testator and was then vested in John Lloyd for the benefit of the seven younger children of the testator, their representatives and assigns, as tenants in common thereof, and that the right to nominate the clerk to be presented to the living in the mean time, and until the sale of the advowson of the rectory, was vested in the seven younger children, their representatives and assigns, as tenants in common, and was to be exercised according to seniority, that a partition should be made thereof into seven parts, and that the right to nominate the clerk to be presented to the living upon the existing vacancy was vested in the defendant Charles Phillips Johnstone as the eldest of the tenants in common. (a)

(a) The following is from the minutes of the order pronounced by the Master of the Rolls: —

Declare that the right of presentation to the rectory of Culmington passed by the will of the testator Charles Johnstone, and is now vested in John Lloyd, the executor of the will of Henry Lloyd, the last surviving trustee of the testator, for the benefit of the seven younger children of the testator, their representatives and assigns, as tenants in common thereof, and that the right to nominate the clerk to be presented to the living in the mean time, and until the sale of the advowson of the rectory, is vested in the seven younger children, their representatives and assigns, as tenants in common, and it is to be exercised according to seniority. And let a partition be made thereof into seven parts between the defendant Charles Phillips Johnstone, the Rev. John Parkinson Sill and Humfrey Salway as assignees of the defendant John Johnstone, the petitioner George Johnstone, the petitioner Catherine Baugh, the defendant John Johnstone as the surviving trustee of the indenture of settlement dated 12th July, 1813, and made on the marriage of the petitioner Dame Louisa Elizabeth Parke with her late husband the defendant Sir William Parke deceased, Benjamin Collins

* From this order the four petitioners C. Baugh, L. E. * 443 Parke, J. Jennings, and G. Johnstone appealed; * and the * 444 case now came on to be heard accordingly, the petition of C. P. Johnstone being ordered to come on with the appeal.

Mr. Glasse and *Mr. Osborne*, for the appellants.—They submitted that the decision of the Master of the Rolls, so far as related to the point of the right of presentation having passed with the devise of the advowson, was correct; and they referred on this to *Hill v. The Bishop of London*, (a) *Hawkins v. Chappel*, (b) *Earl of Albemarle v. Rogers*, (c) *Martin v. Martin*, (d) and to what had taken place in a former stage of the present suit, *Johnstone v. Baber*. (e) They, however, contended that the Master of the Rolls was wrong in directing the exercise of the right to pre-

Brodie, James Cosmo Melville, Jr., and Robert Ballard Woodd, the present trustees of the indenture of settlement bearing date the 14th November, 1815, and made on the marriage of the petitioner Jane Jennings with the defendant Phillip Jennings since deceased, and Frederick Charles Johnstone as the administrator of the plaintiff Richard Johnstone deceased. And the Court doth declare that the right to nominate the clerk to be presented to the living upon the existing vacancy is vested in the defendant Charles Phillips Johnstone as the eldest of the tenants in common, and that the right to nominate such clerk in the next succeeding or second vacancy is vested in the Rev. John Parkinson Sill and Humfrey Salwey as assignees of the defendant John Johnstone, and that the right to nominate such clerk on the next succeeding or third vacancy is vested in the defendant George Johnstone, and that the right to nominate such clerk on the next succeeding or fourth vacancy is vested in the petitioner Catherine Baugh, and that the right to nominate such clerk on the next succeeding or fifth vacancy is vested in the defendant John Johnstone for the benefit of the parties interested under the indenture of settlement of the 12th July, 1813, and that the right to nominate such clerk on the next succeeding or sixth vacancy is vested in the said B. C. Brodie, James Cosmo Melville, Jr., and Robert Ballard Woodd for the benefit of the parties entitled under the indenture of settlement dated the 14th November, 1815, and that the right to nominate such clerk on the next succeeding or seventh vacancy is vested in the said Frederick Charles Johnstone for the benefit of the several parties interested under the will of the plaintiff Richard Johnstone deceased. And let the advowson of the rectory of Culmington, and the testator's messuages, lands, tenements, and hereditaments situate within the parish of Culmington, be sold. And let the rest of the petition stand over, and any of the parties are to be at liberty to apply to this Court as they may be advised.

(a) 1 Atk. 618.

(d) 12 Sim. 579.

(b) 1 Atk. 621.

(e) 8 Beav. 233.

(c) 2 Ves. Jr. 477; 7 Bro. P. C. 522.

sent according to seniority, but that he ought to have directed it to be determined either by lot or by the majority. They cited on this *Seymour v. Bennet*, (a) where Lord HARDWICKE had directed lots to be drawn as to the nomination of a clerk in the prerogative office, and they mentioned also *Salisbury v. Philips*. (b)

Mr. W. Regnier Moore was for parties in a similar interest to the appellants.

Mr. Chapman Barber appeared for two parties, who were devisees under the will of William Johnstone the son. — He * 445 hinted that a question might be raised whether * the original devise was not void for remoteness, but he did not address any argument to the Court on the point.

Mr. Elmsley and *Mr. Murray*, for C. P. Johnstone. — They submitted that the right of presentation did not pass under the devise of the advowson, that it was an interest undisposed of by the testator's will and therefore passed to W. Johnstone as heir-at-law, that W. Johnstone had not devised it by his will, and that therefore it was now vested in C. P. Johnstone. They insisted that the authorities cited on the other side upon this point did not apply, and they mentioned in addition, and as in favour of the present argument, *Mirehouse v. Rennell*, (c) *Sherrard v. Lord Harborough*, (d) *Marquis of Townshend v. The Bishop of Norwich*. (e)

They then contended if there was no intestacy, and the right of presentation passed with the advowson to the seven children, that the Master of the Rolls had decided rightly in giving the exercise of the right according to seniority. They referred to the rule as to coparceners, where in the case of non-agreement the eldest would present, and urged that this was not founded on any right peculiar to coparceners, but on the simple fact of non-agreement, and that it was equally applicable to tenants in common; they cited 2 Rol. Abr. p. 346, (g) with the authorities there mentioned,

(a) 2 Atk. 482.

(c) 1 Cl. & Fin. 527.

(b) 1 Ld. Raym. 535.

(d) 1 Amb. 164.

(e) Sanders on Uses and Trusts, vol. i. p. 360, 5th ed.

(g) The following is the passage referred to: "Presentment al Esglise per coparceners tenants en common ou joyntenants (G.). Que presentera de com-

and Co. Litt. 166 b, 186 b; and commented on *Seymour v. Bennet* (a) and *Earl of Clarendon* * v. *Hornby*, (b) but in- * 446
sisted that there was no real authority in favour of either
deciding by lot or by the majority.

[THE LORD CHANCELLOR. — You need not say any thing about
the majority : there is no authority for so settling the right.]

The argument on behalf of C. P. Johnstone was this, namely,
that there was a trust which the Court would carry out, that the
right of presentation was no part of the advowson, that it either
belonged to the heir, or, taking such authority as there was on the
point and drawing some line by analogy, that the tenants in com-
mon not agreeing, the eldest ought to exercise the right.

The case of *Taylor v. Frobisher* (c) was mentioned on the ques-
tion of remoteness.

Mr. Hoare appeared for the trustees of the will of William
Johnstone the son.

Mr. Schomberg was for Frederick C. Johnstone, the adminis-
trator of Richard Johnstone, one of the seven children, who was
dead.

Mr. Shebbeare, for the executor of the surviving trustee of the
testator, stated that his client was ready to present any person
whom the Court might appoint.

Mr. Glasse replied. — He pressed the decision of Lord HARD-
WICKE in *Seymour v. Bennet* (a) as being in point, and as laying
down the rule which ought to be followed in the present case.

* THE LORD CHANCELLOR. — The doubt I have had in * 447
this case has been upon the question of the right of the
heir-at-law, but I have come to the conclusion that upon that
point the decision of the Master of the Rolls is quite right, and

mon droit: 1. De common droit s'ils ne poient agreer, l'eigne presentera al
primer voidance & al 2 le 2 coparcener issint oustre chescun en order."

(a) 2 Atk. 482.

(b) 1 P. W. 446.

(c) 5 De G. & S. 191.

that there is nothing left undisposed of. The legal estate in every thing is given to the trustees, and the question is whether there is any resulting trust to the heir-at-law as to this right of presentation, and I think there is not. The will is extremely inartificially framed. Every thing real and personal, including this advowson, is given to the trustees, the trust being to sell every thing, and to give to certain persons the enjoyment of the proceeds of the sale. Then the testator, adverting to the fact that one of his sons was the person who held the living, desires that the advowson shall not be sold during the son's lifetime, a precaution apparently unnecessary, but not really so when you couple with the advowson the piece of land which there was in the parish adjoining the glebe, and of which, I suppose, he was seised in fee, and which therefore was to go with the living. He meant to say that none of the property in the parish of Culmington was to be sold so as to interfere with the son's enjoyment; but, subject to that, the direction was the same as if every thing had been given to the trustees upon trust to sell, and until sale to permit the property, the subject of the devise, to be enjoyed by the persons who were to take the produce of the sale.

The advowson is thus to be enjoyed by certain tenants in common, for that is what it comes to, and is to be sold as soon as it can be, and if it can be sold the right to present accrues. The right accrues, not by way of resulting trust to the heir-at-law, but as

part of the enjoyment of the *corpus*. How is it to be

* 448 enjoyed? It is * true there is very little of authority on the subject; but I think, with great respect to the Master of

the Rolls, that what there is appears all to point one way, namely, that if the parties cannot agree they must draw lots. There is the authority of Lord HARDWICKE, who, in a case, *Seymour v. Bennet*, (*a*) not exactly this, but closely resembling it, directed that the parties were to draw lots as to who was to present to an office in the Prerogative Court; and he said, not merely in the reported judgment, but in the decree itself, that the Court gave the direction in analogy to what it does in the case of tenants in common. The words of the decree are, "The plaintiff and the defendant refusing to agree in the nomination of any one person to the said vacant office of clerkship, his Lordship doth declare that the like

(*a*) 2 Atk. 482.

rule ought to be observed in this case as in the case of a partition of an advowson at common law between tenants in common, and that they ought to nominate the person to be appointed to such office of clerkship by turns, and that the plaintiff and defendant, or any person to be authorized by them respectively by any writing, &c., do go before the Master, and in his presence draw lots for their turns of nomination." (a)

The authority thus afforded by Lord HARDWICKE is certainly not contradicted, but very much confirmed, by what little other authority there is upon the subject. A reference was made to Rolle's Abridgment (it is in Norman French, and the language is a little loose) as to who * is to present to a church in the * 449 case of coparceners, tenants in common, or joint tenants; and it is there said that if they cannot agree the eldest shall present on the first voidance, and on the second the second, and so on, plainly intimating that what Rolle was there particularly speaking of were coparceners, and coparceners only. The section is one of a number of sections relating to the presentation by coparceners, tenants in common, and joint tenants; and it is quite clear that that particular provision had reference only to coparceners. The word "*eigne*," applied to the person to present, is a word which has reference to coparceners, and that word and the "*enitia pars*" derived from it relate to coparceners, and to coparceners only. Whatever authority, therefore, is to be deduced from this book, which speaks of coparceners not presenting altogether, but *successivé*, must be taken as an authority applicable to coparceners as a class distinguishable from tenants in common and joint tenants; and, that being so, it is no authority whatever for tenants in common presenting *successivé*.

I must confess, however, that, even if there had not been any reason of the kind I have just mentioned, I should have been very slow to adopt the doctrine of "*eigne*" about tenants in common, because it is of the very essence of tenants in common that they acquire or may acquire their title by different instruments. The

(a) The decree then proceeded as follows: "And that such of them to whose lot the first turn shall fall do nominate a proper person to the office of clerkship now vacant, and that the person to whose lot the second turn shall fall do nominate a proper person to such of the said offices of clerkship as shall next become vacant, and so from time to time alternately and by turns as any of the said offices of clerkship shall become vacant." Reg. Lib. 1742, folio 96.

common illustration always is, that if there be three or more joint tenants and coparceners, and they all convey, that they become tenants in common. What is the meaning of the eldest tenant in common? I can understand when a tenancy in common has been created by a devolution from coparcenary, that one of the tenants, although not the eldest, may stand in the place of the eldest coparcener, and may thus have a sort of right by *eignéship*; but,

* 450 as to tenants in common not created by the severance * or destruction of a coparcenary, the term eldership has no meaning. One person may be the eldest, although he may have derived his title yesterday, and the youngest may have derived his title for a longer period of time. I think, therefore, that there is no analogy furnished by the case of eldership in coparcenary which can possibly be applicable to the case of tenants in common.

Besides the authority of Lord HARDWICKE in the case I have referred to, there is a passage in Co. Litt. 186 a, where a difference is evidently pointed out between joint tenants and tenants in common and coparceners, for it is stated that if two or more coparceners cannot agree, the result is that they may present *successivé*, intimating that such could not be the case as to any person claiming a right in common other than in coparcenary.

I think, therefore, that the order of the Master of the Rolls is inaccurate, and that we must refer it to the Judge for the vacation, who will refer it to his clerk, to settle by lot between the seven who shall nominate, and then the trustee must present the person who may be selected by the party who draws the lot. The costs of all parties must come out of the testator's estate.

THE LORD JUSTICE KNIGHT BRUCE. — I wish that I could have seen my way to the conclusion at which the Master of the Rolls has arrived in favour of the heir of the family who has a son in orders. I regret very much to be obliged to decide against him, but I feel myself constrained to come to the same conclusion as the Lord Chancellor. In reference to the shares which are in settlement, we think that the tenants for life, and not the trustees, should represent those shares. As we only now provide for one presentation, if, as may possibly happen, the living shall

* 451 * again become vacant before the sale, the parties will have to come to the Court again.

The following was the order drawn up in pursuance of the foregoing decision : —

“ Upon the petition, &c. And upon hearing counsel for, &c. Their Lordships do order that the said order of the Master of the Rolls dated the 2d day of August, 1856, be varied. And their Lordships do declare that the right of presentation to the rectory of Culmington, mentioned in the will of Charles Johnstone, the testator in the petition named, upon the avoidance thereof by the death of the said testator's son, William Johnstone, the last incumbent thereof, passed by the will of the said testator, Charles Johnstone, and that such right of presentation is now vested in the defendant, John Lloyd, the surviving executor of the will and devisee of the trust estates of the defendant, Henry Lloyd deceased, the last surviving trustee of the will of the said testator, Charles Johnstone, for the benefit of the following seven persons (that is to say) : the defendant Charles Phillips Johnstone, the defendant John Johnstone, the petitioner George Johnstone, the petitioner Catherine Baugh, widow, the petitioner Dame Louisa Elizabeth Parke, widow, the petitioner Jane Jennings, widow, and Frederick Charles Johnstone in the petition named the administrator with the will annexed of the plaintiff Richard Johnstone deceased, as tenants in common. And such persons not agreeing upon the clerk to be nominated for presentation to the said living by the said defendant John Lloyd, it is ordered that such seven persons, or their respective solicitors on their behalf, do draw lots which of them

* shall nominate a clerk for presentation to the said living * 452 by the said John Lloyd before the Judge to whose Court these causes are attached, or during the vacation before any other Judge of this Court. And it is ordered that the said defendant, John Lloyd, do present to the said living upon the said avoidance such clerk as shall be nominated by such one of the said seven persons as shall be named in the certificate of the chief clerk as the person by lot entitled to nominate the clerk for presentation to the said living as aforesaid. And as soon as may be after such presentation shall have been made, it is ordered that the said advowson of the said rectory of Culmington, and the said testator's messuages, lands, and hereditaments situate in the parish of Culmington in the county of Salop, be sold with the approbation of the said Judge, and it is ordered that the money to arise by the

said sale be paid into the bank with the privity of the accountant-general of this Court to the credit of these causes." The order then gave directions as to payment of the costs of all parties out of the testator's estate, and ordered that the petition presented by the appellants to the Master of the Rolls should in all other respects stand over to be disposed of by his Honor, with liberty to any of the parties to apply.

* 453

* TENCH v. CHEESE.

1855. May 29. June 1, 27. Before the Lord Chancellor Lord CRANWORTH and the LORDS JUSTICES.

A testator gave his real and personal estate to trustees, in trust to pay an annuity to M. P. S., and if she should have children to raise 4000*l.* for the younger children, and he gave the residue "with the accumulation thereof which I hereby direct my said trustee or trustees to place out on mortgages or in government securities in the public funds" upon trust for the eldest son of M. P. S. on his attaining twenty-one and taking the testator's name, and if there should be no child of M. P. S. then on trust for E. B. T. upon attaining twenty-five and taking the testator's name: at the expiration of twenty-one years from the testator's death M. P. S. had no child: *Held*, that the will contained an express direction to accumulate, and that the case fell within the Thellusson Act.¹

Although the will contains no express direction to accumulate, yet if an accumulation necessarily takes place by reason of the form in which the property is given the case falls within the Act. *Semble*, by the Lord Chancellor and the Lord Justice TURNER.²

Held, also, following the decision in the case of *Boughton v. Boughton*, 1 H. L. Cas. 406, that the annuity to M. P. S. was primarily payable out of the personal estate. By the Lord Chancellor and the Lord Justice TURNER, *dubitante* the Lord Justice KNIGHT BRUCE.³

¹ See *Viscount Barrington v. Liddell*, 2 De G., M. & G. 480, n. (2) and cases cited; *Monypenny v. Dering*, 2 De G., M. & G. 145 and notes; *Edwards v. Tuck*, 3 De G., M. & G. 40, n. (2); *Lewin Trusts* (5th Eng. ed.), 71 *et seq.*; 1 *Jarman Wills* (3d Eng. ed.), 292 *et seq.*; *Matthews v. Keble*, L. R. 3 Ch. Ap. 691; *Thorndike v. Loring*, 15 Gray, 391; *Sears v. Putnam*, 102 Mass. 5; *Fosdick v. Fosdick*, 6 Allen, 41; *Odell v. Odell*, 10 Allen, 1; *Loring v. Blake*, 98 Mass. 253; *Otis v. McLellan*, 13 Allen, 339; *Jackson v. Phillips*, 14 Allen, 539; *Hosea v. Jacobs*, 98 Mass. 65.

² *Lewin Trusts* (5th Eng. ed.), 73, 74.

³ 1 *Jarman Wills* (3d Eng. ed.), 594; *Tidd v. Lister*, 3 De G., M. & G. 857 and n. (3); *Hill Trustees* (3d Am. ed.), 513 n. (1), and cases cited.

THIS was an appeal from a decision of the Master of the Rolls on a petition presented in the suit, the main question raised on the petition being whether the trusts for accumulation contained in the will of John Sherburne, the testator in the cause, were void within the Thellusson Act 39 & 40 Geo. 3, c. 98: his Honor having decided that the trusts were not void, the heir-at-law, who was also one of the next of kin, appealed. The following are the circumstances under which the appeal was brought.

The testator John Sherburne, by his will, dated the 25th April, 1831, devised and bequeathed to two trustees and their heirs, executors, &c., all his real and personal estate upon trust to permit his wife to enjoy his dwelling-house and furniture *durante viduitate*, and “out of the rents, issues, and profits, dividends, interest, and income of all other his real and personal estate” to raise and pay his widow 1000*l.* a year *durante viduitate*, * and * 454 “out of the same rents and profits, dividends, interests, and income” to pay Ann Parry an annuity of 100*l.* a year: and subject thereto he directed the trustees to stand possessed of his real and personal estates upon trust to raise 4000*l.* for his younger children, “and the rest, residue, and remainder of his real and personal estate” he gave to his eldest son and his heirs, and if no son to his eldest daughter and her heirs: and in case there should be no such child living at his death, then as to the whole of his said real and personal estates and the accumulations and saving (if any) upon trust to pay Maria Parry Sherburne 200*l.* a year, which upon the termination of the wife’s interest was to be increased to 500*l.* a year.

The testator then proceeded as follows: “And if the said Maria Parry Sherburne should have any child or children lawfully begotten, I direct my said trustee or trustees for the time being to raise the sum of 4000*l.* on my real and personal estate, to be equally divided between all the younger children of Maria P. Sherburne if more than one share, and share alike on their attaining the age of twenty-one years, and the share or shares of such younger child or children respectively as shall depart this life before the said age of twenty-one years to be equally divided with the accumulation (if any) between them share and share alike. And all the rest, residue, and remainder of my real and personal estate, with the accumulation thereof, which I hereby direct my said trustee or trustees to place out on mortgages or in government securities in the public

funds upon trusts for the eldest son of the said Maria P. Sherburne and his heirs and assigns, on his attaining the age of twenty-one years, he taking the name of Sherburne; and, if there should be no son of the said Maria P. Sherburne, then upon trust for * 455 the eldest * daughter of the said Maria P. Sherburne, her heirs and assigns, on her attaining the age of twenty-one years, she taking the name of Sherburne. And in case there shall be no child or children of the said Maria P. Sherburne, or in case the child if but one, or all the children if more than one, of the said Maria P. Sherburne, should depart this life, being a son or sons under the age of twenty-one years, without leaving any issue of his or their body or respective bodies lawfully begotten, living at his or their death or respective deaths, or being a daughter or daughters under the age of twenty-one years, without having been married with the consent of my said trustee or trustees for the time being, then as to the whole of my said real and personal estate and the accumulation and savings (if any) of the rents, dividends, and income thereof subject and without prejudice as aforesaid upon trust for Edward B. Tench, he, the said Edward B. Tench, taking the name of Sherburne, his heirs, executors, administrators, and assigns respectively, absolutely for his and their own use and benefit, and to be conveyed, assigned, transferred, and disposed of as he or they shall direct or appoint." The testator also by his will gave a pecuniary legacy of 500*l.*, which he directed should be raised out of his personal estate.

By a codicil, dated the 28th March, 1832, the testator revoked the gift to Edward B. Tench, and gave to his trustees in the following terms: "The whole of my real and personal estate, with the accumulation and savings (if any) subject to the provisions and conditions mentioned in my said will in trust for John Sherburne Tench, his heirs, executors, administrators, and assigns respectively, absolutely on his attaining the age of twenty-five years, he, the said John Sherburne Tench, taking the name and bearing the arms of Sherburne. And if the said John Sherburne * 456 Tench should not attain the age of * twenty-five years and should die without leaving lawful issue, then I give the whole of my real and personal estate and the savings (if any) to my trustees above named, their heirs, executors, administrators, and assigns in trust for the use and benefit of Edward B. Tench, upon his attaining the age of twenty-five years, he, the said

Edward B. Tench, taking the name and bearing the arms of Sherburne."

The testator died on the 13th December, 1832, without ever having had any issue, and his widow died in 1835; Maria Parry Sherburne married Mr. Archbold, but never had any children, and she was still living.

The period of twenty-one years from the testator's death having expired on the 13th December, 1853, and there being considerable accumulation and a large surplus of income beyond the annuity of 500*l.* a year, the testator's heir-at-law presented a petition, praying a declaration that the trust for accumulation in the will beyond twenty-one years from the testator's death was void, and that it might be also declared that, subject to the annuity to Mrs. Archbold, the petitioner was, as heir-at-law, entitled to the rents of the testator's real estate, and, as one of the next of kin, to a share of the income of the personal estate "from the said 14th day of December, 1853," until there should be issue of Maria Parry Archbold entitled in possession under the said will to the testator's real and personal estate, or until the plaintiffs, John S. Tench and Edward B. Tench, or one of them, should become entitled in possession to the same estates, and the petition prayed payment and consequential directions.

This petition was heard by the Master of the Rolls in July, 1854; and in November following his Honor delivered *judg- * 457 ment, holding that the will contained no express direction to accumulate; that the accumulation took effect by reason of the law and practice of the Court, and not by reason of any direction given by the testator, and that, this being so, the case did not therefore come within the meaning of the Thellusson Act. On another point which was raised by the petition, namely, whether the annuity to Mrs. Archbold ought to be paid *pari passu* out of the real and personal estate or exclusively out of the personal estate, his Honor gave no opinion.

A full report of the hearing before the Master of the Rolls will be found in the 19th volume of Mr. Beavan's Reports, p. 3, from which the foregoing statement of the will and codicil and other facts has been taken.

The petitioner, the heir-at-law and also one of the next of kin of the testator as above stated, appealed from the decision of the Master of the Rolls, raising also the question of the mode in which

the annuity ought to be paid; and the appeal now came on to be heard before the full Court.

Mr. Follett and *Mr. G. L. Russell*, for the appellant. — The decision of the Master of the Rolls proceeded on the ground that the will in this case contained no express direction to accumulate, and that the Thellusson Act only applies to an express direction to accumulate, and does not affect what may be termed a necessary accumulation. The appellant, however, submits, first, that there is in this will an express direction to accumulate, and, secondly, that, if there is not, the distinction taken by his Honor cannot be maintained. On the first point, namely, the * 458 construction to be put on the * terms used by the testator, the Master of the Rolls was influenced by the case of *The Corporation of Bridgnorth v. Collins*; (a) but we refer to *Shaw v. Rhodes*, (b) *M'Donald v. Bryce*, (c) *Halford v. Stains*, (d) and *Morgan v. Morgan*, (e) as being inconsistent with that construction and in favour of the construction for which the appellant contends. Supposing, however, that the will does not contain any express direction to accumulate, we insist that, the necessary effect of what the testator has directed being to cause an accumulation, the result is the same as if there had been an express direction, and that therefore the case is within the statute: it is submitted that the view taken by the Master of the Rolls on this point is not correct: the late Vice-Chancellor of England indeed, in *Elborne v. Goode*, (g) expressed an extra-judicial opinion to the same effect, referring to *Eyre v. Marsden*; (h) it is, however, impossible to reconcile it with the decision in *Griffiths v. Vere* (i) and other cases: the statute not only strikes out the direction to accumulate, leaving all the other dispositions untouched, but by putting a stop to the accumulation it makes the will inoperative, and hands over the property to the heir-at-law or next of kin as in a case of intestacy. *Edwards v. Tuck*, (k) *Burt v. Sturt*. (l) The consequence of adopting the view taken by the Master of the

(a) 15 Sim. 538.

(b) 1 Myl. & Cr. 135; S. C. *sub nomine* *Evans v. Hellier*, 5 Cl. & Fin. 114.

(c) 2 Keen, 276.

(h) 2 Keen, 564.

(d) 16 Sim. 488.

(i) 9 Ves. 127.

(e) 4 De G. & S. 164.

(k) 3 De G., M. & G. 40.

(g) 14 Sim. 165.

(l) 10 Hare, 415.

Rolls would be to enable any man to evade the statute altogether by simply directing his estate to be administered by the Court, since the practice of the Court is always to accumulate.

* They mentioned also the cases of *Pride v. Fooks* (a) * 459 and *The Attorney-General v. Alford*, (b) as to the obligation to accumulate which was imposed by the will on the trustees. They further contended that the annuity of 500*l.* ought to be paid exclusively out of the personal estate, relying on *Boughton v. Boughton*, (c) as a case precisely in point, and citing *Tidd v. Lister*. (d)

[The Lord Justice TURNER mentioned *Roberts v. Walker* (e) as an authority on the other side, and at a subsequent stage of the argument *Genery v. Fitzgerald*. (g)] (h)

Mr. R. Palmer and *Mr. W. W. Cooper* supported the decision appealed from.— They relied generally on the line of reasoning adopted by the Master of the Rolls, citing *Wilson v. Wilson* (i) to show that the Court must keep strictly within the terms of the Act, and insisting that the Act made a clear distinction between a direction to accumulate and the mere postponement of enjoyment. They drew attention to the fact that the view of the statute taken by the Master of the Rolls had been brought before the House of Lords in the argument of *Evans v. Hellier*. (k) They referred to the case of *The Corporation of Bridgnorth v. Collins* (l) and *Morgan v. Morgan*, (m) contending that * 460 they were irreconcilable, and that one or other must be overruled, but submitting that the former was correct. They cited *Griffiths v. Vere*, (n) observing that Lord ELDON there instanced a

(a) 2 Beav. 430.

(b) 19 Jur. 361, since reported 4 De G., M. & G. 843.

(c) 1 H. L. Cas. 406.

(e) 1 Russ. & M. 752.

(d) 3 De G., M. & G. 857.

(g) Jacob, 468.

(h) A further point was also alluded to, namely, whether the disposition in question was not the case of a portion, and as such, not within the operation of the statute: the counsel, however, for the respondents, declined to argue it, having regard to what had been decided in the cases of *Edwards v. Tuck*, 3 De G., M. & G. 40, and *Barrington v. Liddell*, 2 De G., M. & G. 480.

(i) 1 Sim. N. S. 288; see p. 298.

(m) 4 De G. & S. 164.

(k) 5 Cl. & Fin. 114.

(n) 9 Ves. 127.

(l) 15 Sim. 538.

case in which, by the combined operation of a direction to accumulate for twenty-one years and the infancy of the devisee, an accumulation might go on for forty years. They also mentioned and commented on *M'Donald v. Bryce*, (a) *Eyre v. Marsden*, (b) *Lombe v. Stoughton*, (c) *Bryan v. Collins*. (d)

Mr. Follett replied. (e)

THE LORD CHANCELLOR. — This case has been very fully and ably argued, and the interval which has elapsed since the rising of the Court on the first day of the hearing, having given an opportunity of looking into the judgment of the Master of the Rolls and the authorities which have been referred to, I see no reason why the Court should delay the parties by postponing its judgment; and being of opinion that the view taken by the appellant is correct, I will proceed to state shortly the grounds for the conclusion at which I have arrived.

We have in this case to deal with one perhaps of the most ill-drawn Acts to be found in our statute book; and it is rather * 461 singular that it should be so, for it is * well known that it was introduced in consequence of a very important will under the sanction of the Lord Chancellor of that day, that it was much considered and underwent great discussion, every one concerned feeling the importance of the subject: it is, however, notwithstanding, framed unfortunately in such very obscure language, that it has been found exceedingly difficult to apply it to the different cases which from time to time have arisen.

The ground on which the Master of the Rolls has proceeded in the case before us is this: he says that there is no express direction in the will to accumulate, that the accumulation takes place not by reason of any direction of the testator, but by reason of the property being given contingently after an indefinite lapse of years, during which time, if there is nobody to enjoy it, it must by the rule of the Court be accumulated, and that this is not what the

(a) 2 Keen, 276.

(c) 12 Sim. 304.

(b) 2 Keen, 564; 4 Myl. & Cr. 231.

(d) 16 Beav. 17.

(e) The personal representatives of the testator's widow, who would have been interested in contending against the view taken by the appellant of the mode in which the 500*l.* annuity was to be paid, though served with the petition of appeal, did not appear.

statute in terms points out or means to restrain. I do not think, for the reason I will state, that it is necessary for me now to decide whether this view of the Act, which also seems to have been entertained by the late Vice-Chancellor of England, be or be not the correct one, but I should not be discharging my duty, if I were not to state that my opinion, so far as it goes, is that the distinction is an unsound and impossible one. If a testator directs that to be done which, as a necessary consequence, leads to an indefinite accumulation, he must within the meaning of the statute be taken to have directed accumulation : that rests on a principle of law which is applied to every case, and is pre-eminently applicable in cases of construction of wills.

It was only yesterday that I happened to meet with one of the learned Judges (Mr. Baron PARKE), and talking with him on a subject germane to the present, * he mentioned a case * 462 which struck me as having considerable application to the one before us. He said that early in his judicial career an action for trespass was brought against a person for having thrown a quantity of lime or gravel into the garden of his neighbour's house ; the defendant pleaded not guilty, and it turned out upon the evidence that he had directed one of his workmen to accumulate upon his, the defendant's, own ground adjoining the garden in question a great quantity of earth, gravel, and lime, but had expressly told the man to take particular care that the neighbour was not damaged ; he, however, had directed the accumulation to be made in such a mode that the jury were satisfied that the necessary consequence was that a portion of the lime would fall over into the garden ; the learned Judge said that he had very much doubted about it at the time, but had since been satisfied that the Court came to a right decision in holding that an action of trespass laid against the master, because the servant was only doing that which the master ordered him to do, and which the jury thought would necessarily lead to the falling of the lime upon the neighbour's garden. It struck me that this was rather pertinent to the present case, for if such be the principle applicable to a matter of criminal proceeding, *a multo fortiori* ought it to be applied when we are looking at and considering the language of a will to see whether the testator does or does not direct that which is the necessary consequence of his will. The leaning, then, of my opinion is, that, if I had to decide the point, I should hold that if a testator directs his property

to go in such a course, that upon certain contingencies there must be an accumulation beyond twenty-one years, he does direct that upon those contingencies the accumulation shall take place beyond that time. Nor do I think that this opinion is at all interfered with by what fell from Lord *ELDON in *Griffiths v.*

* 463 *Vere*; (a) in truth I never thought that illustration used by Lord ELDON was made with his usual felicity, where he speaks of property getting into the hands of an infant, and the Court then directing it to be accumulated. Accumulation there has a different meaning and aspect from accumulation directed while the enjoyment of the property is in suspense. In the instance of property coming to an infant, accumulation is only just that which, if it was not the case of an infant, the owner might do for himself: if he chooses to accumulate the rents instead of spending them, he may do so; and when the property comes to an infant, as the infant has no will to say whether it shall be spent or accumulated, the Court expresses its will for the infant, and says that the most advantageous way of applying the rents is to accumulate them for him, that is, for the benefit of the person who is in possession: this is a totally different thing from accumulating a fund, so that it is to go as a suspense fund after an indefinite lapse of time to somebody for whose benefit it was not accumulated and who was not in the enjoyment during the time of accumulation; the illustration, therefore, does not seem to me to bear at all upon the present case. The opinion, however, which I have just expressed, is beyond the present question, because, if it were necessary to hold that there must be an express direction to accumulate, I cannot read this will without coming to the conclusion that there is such an express direction. I presume it cannot be contended, that the testator must say in words, "I direct my trustees to accumulate;" if he gives a direction which means the same thing, that will be a direction to accumulate. What the testator here says is this, "And the share or shares of such younger child or children re-

* 464 spectively * as shall depart this life before the said age of twenty-one years to be equally divided with the accumulation (if any) between them" (the words "if any" were necessary because some circumstances might have happened in which there would not be any accumulation at all), "share and share alike

(a) 9 Ves. 127.

and all the rest, residue, and remainder of my real and personal estate with the accumulation thereof which I hereby direct my said trustee or trustees to place out on mortgages or in government securities in the public funds upon trust," &c. Do these words, "which I hereby direct my said trustee or trustees to place out on mortgages or in government securities in the public funds," mean "which I direct them to accumulate to make investments of in the public funds from time to time"? It appears to me that they amount to an express direction to accumulate. Such being the state of the case, all the discussion into which the Master of the Rolls very ably and elaborately goes on the several authorities which conflict on the subject is out of the question, because I think that his Honor, if he had interpreted the will as I do, would have held that the case was within the statute. I therefore do not think it necessary to notice the cases of *The Corporation of Bridgnorth v. Collins*, (a) *Elborne v. Goode*, (b) *Morgan v. Morgan*, (c) *M Donald v. Bryce*, (d) and others, which have been referred to in the argument; they relate to the question, what would have been the result if there had not been the words to which I have referred, but there being those words no question whatever seems to me to arise. I am thus of opinion, with great respect to the Master of the Rolls, that he came to a wrong conclusion, and that there was this direction to accumulate; and the result is, that the accumulation must be stopped at the end of twenty-one years.

* The other point which was made as to the annuity is, I * 465 think, determined by the case of *Boughton v. Boughton*. (e)

It seems to me to have been there decided, that where an annuity is charged upon a mixed fund of real and personal estate, if the real estate is directed to be sold, the ordinary rule that prevails as to debts will prevail in spite of that charge. No doubt the only meaning is, that it is to be paid out of the personal estate if sufficient, and if insufficient to be charged upon the real estate. This point was not decided by the Master of the Rolls, because it did not arise: I have given my opinion upon it, and all that it will be necessary to do is to make a declaration in the order accordingly.

THE LORD JUSTICE KNIGHT BRUCE. — This case appears to me

(a) 15 Sim. 538.

(d) 2 Keen, 276.

(b) 14 Sim. 165.

(e) 1 H. L. Cas. 406.

(c) 4 De G. & S. 164.

also to fall within the Thellusson Act, unless indeed it is saved by the second section of that statute. The Lord Chancellor and the Lord Justice TURNER are both of opinion that it is not saved by the second section, and I need not say that they are very likely to be right. I am not, however, entirely free from doubt as to the point on the second section, but the doubt is of course immaterial.

With regard to the question of throwing the annuity of 500*l.* a year on the income of the personalty to the relief of the rents of the real estate, and not charging both with it, *pari passu*, according to their respective amounts, I entertain some doubt also; but the agreement in opinion of the Lord Chancellor and the Lord Justice TURNER, upon this point likewise, renders the latter doubt as unimportant as the former.

* 466 * THE LORD JUSTICE TURNER. — It is not necessary in this case to decide what will amount to a disposition of real or personal estate, whereby the profits and produce are directed to be accumulated, and the beneficial enjoyment postponed. Had it been necessary to decide that question, I should certainly have desired further time to consider it. Possibly it may be found in the result to depend upon the provisions of each particular instrument, whether on the true construction of the instrument the accumulation was a primary object or incidental merely. In the present case, however, as I have already observed, it does not seem to me to be necessary to touch that point, for, as I understand this will, it contains an express direction to accumulate the income of the property; and no one has doubted, or can doubt, that if there be an express direction to accumulate beyond the period allowed by law, that accumulation must fail. The directions of this will are in these terms: “And all the rest, residue, and remainder of my real and personal estate, with the accumulations thereof, which I hereby direct my said trustee or trustees to place out on mortgages, or in government securities.” It seems to me that the words “which I hereby direct” have reference to the immediately preceding words of accumulation, and are to be read “which accumulation I hereby direct,” and that the case therefore falls directly within the statute.

That question being so disposed of, it was argued, that according to the decided cases, the direction to accumulate was to be struck out of the will, leaving the other directions in the will to

take effect; but I think this argument rests upon a misunderstanding of some expressions used by Lord LANGDALE, for the effect of the argument, if it prevailed, would be wholly to repeal the * provisions of the statute, and to have the accumula- * 467 tions to take effect according to the intentions of the testator against the provisions of the statute.

There remains then the question upon the subject of the annuity. I agree in the opinion expressed by the Lord Chancellor upon that point, that the case is in that respect wholly governed by *Boughton v. Boughton*, which, as I understand it, establishes this distinction, that where there is a mixed fund of real and personal estate, the mere fact of the real and personal estate being given together does not constitute them a mixed fund for the payment of debts, legacies, or annuities; but that, in order to effect that purpose, there must be a direction for the sale of the real estate, so as to throw the two funds absolutely and inevitably together to answer the common purposes of the will.

June 27.

After the above decision was pronounced, the cause came on to be spoken to on minutes; and the personal representative of the testator's widow, who, though served with the petition of appeal, had not appeared as above stated, — see *ante*, p. 460, note (*h*), — applied for and obtained permission to be heard on the point that the annuity of 500*l.* should be paid *pro rata* out of the real and personal estate. The case now came on for that purpose accordingly.

Mr. Elmsley, with whom was *Mr. Beavan*, appeared for the representative of the widow. — He submitted that the question was what was the testator's intention, and that this was to be gathered from the whole will; that it was not necessary to impugn * the decision in *Boughton v. Boughton*, (*a*) which * 468 went on the particular terms of the will, although it was to be observed that Lord ST. LEONARDS had expressed his disapproval of the judgment there given: (*b*) in that case it might be said that there was no direction or evidence of intention that the ordinary rule of administration should be departed from, but in the present case a sufficient intention was to be collected from the will to

(*a*) 1 H. L. Cas. 406.

(*b*) Sugden's Law of Property, p. 438.

enable the Court to arrive at the conclusion that the testator meant to charge both funds; for instance, the testator, in giving the legacy of 500*l.*, expressly charged it on his personal estate. He cited *Falkner v. Grace* (a) and *Young v. Hassard*. (b)

Mr. Follett appeared for the petitioner, but was not called on by the Court.

THE LORD CHANCELLOR. — I do not think there is any distinction between the present case and that of *Boughton v. Boughton*. In that case it was decided that, where there was a devise and bequest of a mixed fund of real and personal estate to trustees upon trust to receive the rents and profits and to pay certain annuities, *prima facie*, the personal estate is the primary and the real estate the auxiliary fund for such payment. This is the rule, and it is better to have a rule well settled, than in each case to discuss an abstract proposition while looking for the testator's supposed intention. The distinction which has been attempted to be drawn from the terms of the gift of the 500*l.* legacy cannot in my opinion be made, nor do I think that the rule laid down in *Boughton v.*

Boughton is in any respect an inconvenient one: it may
* 469 indeed * sometimes militate against the testator's intention, but, on the other hand, it may be said that it is a convenient rule, inasmuch as the personal estate is more readily available for the payment of charges than the real estate. The decision in *Boughton v. Boughton* may appear to some to be opposed to the intention of the testator in that particular case, but whether that be so or not, the rule is there clearly laid down, and I cannot see any distinction which can be made between that case and the present.

THE LORD JUSTICE KNIGHT BRUCE. — I continue to entertain a doubt upon this point, but that doubt continues to be immaterial in consequence of my learned brother agreeing with the Lord Chancellor.

THE LORD JUSTICE TURNER. — The case of *Boughton v. Boughton* is in substance the same as this. I doubted for a moment whether

(a) 9 Hare, 280.

(b) 1 Jones & Lat. 466.

the cases were not distinguishable in the circumstance that there was a gift in *Boughton v. Boughton* of the legacy antecedent to the direction for payment; but, upon looking at *Boughton v. Boughton*, I find that the trust was out of the rents and profits of the trust estate to pay the annuities, without any preceding gift of the annuities. In *Falkner v. Grace* there was a distinction which probably influenced my judgment, for the gift there was in moieties.

The following was the order drawn up in pursuance of the foregoing decision:—

1. Let the order in these causes dated the 10th day of November, 1854, so far as the same declares that the accumulations of the rents and dividends incidental to the limitations contained in the will of John Sherburne deceased, the testator in the pleadings named, is good and valid, and orders that the same be continued until further * order, and orders that the receiver * 470 appointed in these causes be continued and as directs the payment of the costs of these suits as therein mentioned, be reversed.

2. Declare that according to the true construction of the will of the said testator, and in the events which have happened, the rents, dividends, and income of the residue and remainder of his real and personal estates subject as in the said will is mentioned are in effect directed to be accumulated until an eldest son or an eldest daughter of the said M. P. Archbold shall attain the age of twenty-one years, or until some child of the said M. P. Archbold shall die, being a son under the age of twenty-one years without leaving issue living at his death or being a daughter under the age of twenty-one years and without having been married with such consent as in the said will mentioned.

3. Declare that the aforesaid direction for accumulation was valid only for the period of twenty-one years, to be computed from the 13th day of December, 1832, the day of the death of the said testator.

4. Declare that the said testator died intestate as to the rents, dividends, and annual produce of his real and personal estate which have accumulated since the 14th day of December, 1853, the end of the said period of twenty-one years, and which hereafter, during the residue of the period for which the said accumulation was in effect directed as aforesaid, may accrue due on the said residuary real and personal estates.

5. Declare that the residuary real and personal estates of the said testator and the accumulations which had accrued due, and been made thereout on the said 14th day of December, 1853, the end of the said period of twenty-one years, ought to be secured for the benefit of the persons who may become entitled thereto, pursuant to the provisions of the said will.

6. Declare that the said defendant John Taylor Stephens, as the heir-at-law of the said testator at the time of his death, is entitled to the rents and profits of the testator's residuary real estates accrued due since the said 14th day of December, 1853, the end of the said period of twenty-one years, and to the accumulations of such last-mentioned rents and profits, and to the rents and profits of the said residuary real estates which hereafter, during the life of the

said defendant Maria Parry Archbold or until the trusts for accumulation by the said will directed as aforesaid shall have sooner ceased, shall accrue due and to the dividends hereafter during the life of the said Maria Parry Archbold, or until the trusts for accumulation so directed as aforesaid shall have sooner ceased to accrue due upon the fund which on the said 14th day of December, 1853, had arisen from the accumulated rents and profits of the said residuary real estate.

* 471 * 7. Declare that the defendant John Griffiths Beavan, the younger, as the administrator of the said testator's widow Mary Ann Sherburne deceased, and the defendant John Taylor Stephens, as cousin and one of the next of kin of the said testator living at the time of the death of the said testator, and the defendant J. Evans, as the executor of Mary Stephens as cousin and only other next of kin of the said testator at the time of his death, are entitled to the dividends and accumulations of dividends which since the said 14th day of December, 1853, the end of the said period of twenty-one years, have accrued on the said testator's residuary personal estate, and on the accumulations thereof on that day and also to the dividends which hereafter during the life of the said defendant Maria Parry Archbold or until the trusts for accumulation by the said will directed as aforesaid shall have sooner ceased shall accrue due on the said testator's residuary personal estate, and the accumulations thereof on the said 14th day of December, 1853. And declare, that the said defendant John Griffiths Beavan, the younger, as such administrator of the said Mary Ann Sherburne deceased as aforesaid, the defendant John Taylor Stephens in his own right as one of the said next of kin of the said testator, and the defendant J. Evans as such executor of the said Mary Stephens deceased as aforesaid, the only other of the said next of kin as aforesaid, are entitled to the said dividends and accumulations of dividends now due and hereafter to accrue due in the proportions following; that is to say, the said defendant John Griffiths Beavan, the younger, as administrator of the said testator's widow Mary Ann Sherburne deceased, to one moiety or equal half part thereof, and the defendant John Taylor Stephens to one equal fourth part thereof, and the defendant J. Evans, as executor of the said Mary Stephens deceased, to the remaining one equal fourth part thereof.

8. Declare that the annuity of 1000*l.* per annum by the said will given to the testator's widow for her life, and the annuity of 100*l.* per annum by the will given to Ann Parry for her life, and the successive annuities of 200*l.* and 500*l.* by the said will given to the defendant Maria Parry Archbold for her life, were and are primarily charged upon, and payable out of the testator's residuary personal estate in exoneration of his residuary real estate.

9. Declare that the costs of all parties of this suit by the said order of the 10th day of November, 1854, directed to be taxed, and the costs of all parties occasioned by this rehearing, and the inquiries hereby directed except so much of such costs as may arise from the separation of the funds belonging to the said testator's heir-at-law, and his widow and next of kin as aforesaid, ought to be paid out of the general estate of the said testator, including the fund

* 472 accumulated up * to the said 14th day of December, 1853, the end of the said period of twenty-one years.

10. Declare that so much of the costs of this suit as may arise from the separation of the funds belonging to the testator's heir-at-law and his next of kin ought to be apportioned *pro rata* between the funds of the said heir-at-law and next of kin. And let the following inquiries be made; that is to say, —

11. An inquiry of what the residuary real estates of the said testator and the accumulations thereof, having regard to the declarations aforesaid, consisted on the 14th day of December, 1853, the end of the said period of twenty-one years.

12. An inquiry of what the residuary personal estate of the said testator and the accumulations thereof, having regard to the declarations aforesaid, consisted on the 14th day of December, 1853, the end of the said period of twenty-one years.

13. An inquiry of what the rents and profits of the said testator's residuary real estate accrued due since the said 14th day of December, 1853, the end of the said period of twenty-one years, and the accumulations of such rents and profits, having regard to the declarations aforesaid, consist.

14. An inquiry of what the dividends and accumulations of dividends which since the said 14th day of December, 1853, the end of the said period of twenty-one years, have accrued on the said testator's residuary personal estate, and on the accumulations thereof on that day and having regard to the declarations aforesaid, consist.

15. Refer it to the taxing master to whom the taxation of the costs of this suit stands referred to tax the costs of all parties occasioned by the said rehearing as between solicitor and client.

16. Let the costs hereinbefore directed to be taxed and the costs by the said order of the 10th day of November, 1854, directed to be taxed, be taxed and paid out of, &c., such payment nevertheless to be made without prejudice to the funds out of which such costs are ultimately to be borne. And let such costs be paid as follows, that is to say, &c. And let the following further inquiries be made; that is to say, —

17. An inquiry what is the amount of the costs by the said order of the 10th day of November, 1854, and hereby directed to be taxed, which having regard to the declarations aforesaid ought to be paid out of the general estate of the said testator, including the fund accumulated up to the said 14th day of December, 1853, the end of the said period of twenty-one years, and what is the amount of the said costs which having regard to the declarations aforesaid ought to be paid out of the funds belonging to the said testator's heir-at-law as aforesaid, and what is the amount of the said costs which having regard * to * 473 the declarations aforesaid ought to be paid out of the funds belonging to the said widow and next of kin as aforesaid.

18. Let the said annuity of 500*l.* to the defendant Maria Parry Archbold be from time to time, until further order, paid out of the dividends of the sum of *l.*, in Court in trust in the said clauses or out of the residue thereof after payment of the costs hereinbefore directed to be paid (such residue to be verified by affidavit) without prejudice to the funds out of which the same is ultimately to be borne and paid according to the declarations hereinbefore contained. And let such annuity be paid by two equal half-yearly payments on, &c., the first payment to be made on, &c.

19. Let the receiver appointed by, &c., be discharged so far as regards the testator's real estates.

20. And the defendant John Taylor Stephens by his counsel undertaking to keep the same in proper repair, let the said defendant John Taylor Stephens be let into possession of the real estates of the said testator, except the real estate by his will specifically devised to the said defendant Maria Parry Archbold for her life.

21. And it is ordered, that the sum of 20*l.* deposited with the registrar on setting down the said petition of rehearing be repaid to the said defendant John Taylor Stephens or to Mr. John Thomas White, his solicitor. Let this order be without prejudice to any question as to the period for which the said accumulation was directed except as hereinbefore declared.

22. Adjourn further consideration and subsequent costs.

23. Liberty to apply.

1855. June 1. July 7. Before the Lord Chancellor Lord CRANWORTH and the LORDS JUSTICES.

A., being indebted to B. on three promissory notes, was applied to by B. for payment on account of interest, but without referring to any debt in particular: in consequence of this application A. paid 5*l.*: at the time of this payment two of the notes were barred by the Statute of Limitations, and one was not barred: *Held*, that the payment must be attributed as made exclusively in respect of the note not barred, and that the effect was as to it to prevent the operation of the statute.¹

¹ In *Pond v. Williams*, 1 Gray, 630, a payment was made by a debtor to a creditor to whom he owed three several distinct promissory notes, two of which were not, and one of which was barred by the Statute of Limitations, without any direction as to its application. The creditor immediately applied the payment to the note barred by the statute. It was held that this did not take the remainder of that note out of the operation of the statute. "To have that effect," SHAW C. J. said, "the payment must be made by the defendant, specifically, on account of the debt thus barred; because it is, by implication, the payment of part of a larger subsisting debt, and therefore it is an admission, a conclusive admission on the part of the debtor, of the actual existence of the balance, as a subsisting debt, notwithstanding the lapse of time, and the legal operation of the statute. From this acknowledgment of the defendant, the law implies a new promise, which prevents the operation of the statute. But to effect this, the payment must be specifically made or directed by the defendant." See *Ayer v. Hawkins*, 19 Vt. 26; *Bancroft v. Dumas*, 21 Vt. 456; 2 Story Eq. Jur. § 1521 *b*; *Angell Limitations* (4th ed.), 254; *Beltzhoover v. Yewell*, 11 Gill & J. 212;

THIS was an appeal by the plaintiffs against an order of Vice-Chancellor WOOD allowing an exception taken by the defendants to a finding of the Master on an inquiry directed at the hearing of the cause. The point to be decided was the effect of a payment made by a debtor to his creditor in preventing the operation of the Statute of Limitations, 9 Geo. 4, c. 14, upon the debt. The question was raised in the following manner.

The plaintiffs, A. D. Nash and Eliza his wife, on the 16th September, 1850, filed their claim against Robert Hodgson, A. S. Stevenson, J. Appleton, and H. T. Appleton, stating, that Hanna Maria Smith, widow, deceased, was at the time of her death and that her estate still was justly indebted to the plaintiff Eliza Nash, or to the plaintiffs A. D. Nash and Eliza his wife in her right, in the sum of 130*l.* 2*s.* 5*d.* for principal money and interest due on a joint and several promissory note dated the 12th June, 1841, and made by H. M. Smith and the defendant John Appleton, whereby H. M. Smith and John Appleton on demand jointly and severally promised to pay to the said Eliza Nash by the name and description of "Miss Eliza Moore" the sum of 200*l.* with lawful interest for the same; that H. M. Smith died on the 21st June, 1848; that the defendants were her executors, and that the debt had not been paid. The plaintiff Eliza Nash therefore claimed, or the plaintiffs A. D. Nash and Eliza his wife in her right claimed, to be paid the debt or sum of 130*l.* 2*s.* 5*d.* with subsequent interest with their costs of the suit or in default to have the personal estate of H. M. Smith administered.

* By an order made at the hearing of the cause, dated * 475 the 7th November, 1851, a reference was directed to the Master to inquire and state whether at any and what time within six years before the filing of the plaintiffs' claim any, and if any what sum of money as and for interest on the promissory note for 200*l.* was paid by the defendant, John Appleton, or on his account, and if so when and under what circumstances; and the Master was to be at liberty to state any circumstances specially.

In pursuance of this order the Master made his report, dated the 20th February, 1854, by which he found that in June, 1841,

Burr v. Burr, 26 Penn. St. 284; Armistead v. Brooks, 18 Ark. 521; Briggs v. Wilson, 5 De G., M. & G. 12, and notes; Knight v. Bowyer, 4 De G. & J. 619. See, as to application of payments generally, 1 Story Eq. Jur. §§ 459 b-459 h; Chitty Contr. (10th Am. ed.) 827-838.

Eliza Nash, then Eliza Moore spinster, being then staying at Birmingham, received from John Appleton by the post the promissory note for 200*l.*, and that in the letter containing the promissory note he requested her to lend him 200*l.* on the security of the promissory note, but that in answer to such application Eliza Nash, then Eliza Moore, replied she could only spare 100*l.* : and he found that Eliza Nash, then Eliza Moore, accordingly enclosed 100*l.* to John Appleton on the security of the promissory note, and retained the note in her possession : and he found that in December, 1846, there were other sums of money due and owing from John Appleton to Eliza Nash, then Eliza Moore, for principal and interest on two other promissory notes for 100*l.* each dated respectively the 29th September, 1839, and the 27th January, 1840, made by John Appleton and Joseph Moore, a brother of Eliza Nash, exclusive of the 100*l.* secured by the promissory note for 200*l.*, the whole of which sum of 100*l.*, together with interest from the date thereof, also then remained due and owing to Eliza Nash, then Eliza Moore, no sum whatsoever, either for principal or interest, having previously to the 16th December, 1846, been paid on account of the last-mentioned promissory note : and he also found that in

* 476 * December, 1846, Eliza Nash, then Eliza Moore, who was then residing with John Appleton in the neighbourhood of London, applied to him for a payment on account of the interest then due to her from him, and that thereupon and on the 16th December, 1846, John Appleton paid to her the sum of 5*l.* on account of interest generally : and he found that, the promissory note for 200*l.* not being at the time she so received the sum of 5*l.* in her own possession, but, together with other securities of the like nature belonging to her, in the possession of the Rev. Edward Madeley of Birmingham, her confidential friend, Eliza Nash, then Eliza Moore, was unable to indorse such payment on the note until the 25th December, when she was at Birmingham, and she then indorsed the same on the note in the words and figures following (that is to say) : “ December 25th, 1846, Received from Mr. J. Appleton £5 on account of interest due on this note, Eliza Moore : ” and he therefore found that within six years before the filing of the plaintiffs’ claim, namely, on the 16th December, 1846, the sum of 5*l.* was paid by the defendant John Appleton as and for interest on the promissory note for 200*l.* in the manner and under the circumstances before mentioned.

The defendants took three exceptions to the finding of the Master: they came on to be argued before Vice-Chancellor Wood on the 4th July, 1854, when his Honor overruled two of them, but allowed the third, which was to the finding, that on the 16th of December, 1846, the sum of 5*l.* was paid by the defendant John Appleton as and for interest on the promissory note for 200*l.* in the manner and under the circumstances in the report mentioned, the defendants insisting that the Master ought not so to have certified, but ought to have certified that no money was at any time within six years before the * filing of the claim paid * 477 by John Appleton or on his account as and for interest on the said promissory note.

The order giving effect to this decision of the Vice-Chancellor ordered the plaintiff's claim to stand dismissed with costs, except the costs of the first and second exceptions and of so much of the affidavits used before the Master as related to the matters referred to in those two exceptions. A report of the case as heard before the Vice-Chancellor will be found in the 1st volume of Mr. Kay's Reports, page 650.

The plaintiffs appealed from the order of the Vice-Chancellor as above mentioned; and the case was in the first instance argued before the Lords Justices. It was, however, subsequently directed to be argued by one counsel on each side before the full Court of appeal, and it now came on for that purpose accordingly.

Mr. Serjeant Atkinson (*Mr. Greene* was with him), for the plaintiffs. — The payment made in this case was according to the evidence sufficient to prevent the operation of the Statute of Limitations as to the note in question. It is submitted that in a case where there are as here several distinct debts, and a payment is made by the debtor, it is a question of fact whether the payment is made in respect of all or of any one in particular, and that if a jury found the payment was made in respect of all or any one, it would take either all or the one out of the operation of the statute: the case of *Waters v. Tompkins* (*a*) is precisely in point, and supports our present contention. He cited the following passage from the Civil Law (Cod. lib. viii. tit. xliii. de Solutionibus, L. 1), “In * potestate ejus est qui ex pluribus contractibus * 478 pecuniam debet tempore solutionis exprimere, in quam

(*a*) 2 C. M. & R. 723.

causam reddat: quòd si debitor id non fecit convertitur electio ad eum qui accepit;" also Erskine's Institutes, B. 3, tit. 4; Stair's Institutes, Sup. 940, ed. 1831; Smith's Leading Cases, ed. 3, Vol. I. p. 321 b (note to *Whitcomb v. Whiting*); *Simpson v. Ingham*, (a) *Philpott v. Jones*, (b) and *Cleave v. Jones*, (c) overruling *Willis v. Newham*. (d)

Mr. Willcock (*Mr. Shebbeare* was with him), for the defendants. — By law, if the debtor does not communicate to the creditor to which of several debts a payment made is to be applied, it is competent for the creditor to appropriate it as he pleases. The appropriation by the creditor will not, however, prevent the operation of the statute: to do that there must be an appropriation by the debtor, this right of appropriation by the debtor being his own right, and one not to be exercised by the creditor by way of delegated authority. The statute expressly provides that the indorsement on the promissory note shall not be proof of payment to take the case out of the statute. As to the part payment, the statute leaves that as it was previously: *Holme v. Green*; (e) and it rests on the party asserting that a payment is made in respect of a particular debt to prove it. See the observations of Mr. Baron PARKE in delivering judgment in *Tippets v. Heane*. (g) He cited and commented on *Mills v. Fowkes*, (h) *Philpott v. Jones*, (b) *Waugh v. Cope*, (i) *Burn v. Boulton*. (k)

* 479 * *Mr. Serjeant Atkinson* replied.

THE LORD CHANCELLOR. — This is an appeal from a decision of Vice-Chancellor WOOD, the question being whether a payment made by the defendant Appleton is to operate as an acknowledgment of the debt claimed by the plaintiffs, so as to prevent the effect of the Statute of Limitations. The facts are that the plaintiff Mrs. Nash held three promissory notes given by the defendant Appleton, one of them being for 200*l.* and dated the 12th June, 1841, and the other two being dated in and previously to

(a) 2 B. & C. 65.

(b) 2 A. & E. 41.

(c) 6 Exch. 573.

(d) 3 Y. & J. 518.

(e) 1 Stark. 488.

(g) 1 C. M. & R. 252.

(h) 5 Bing. N. C. 455.

(i) 6 M. & W. 824.

(k) 2 C. B. 476.

January, 1840. No payment of any kind appears to have been made until December, 1846, when, an application having been made to him by Mrs. Nash, Appleton paid 5*l.* on account of interest. At that time the 200*l.* note which was given as a security for 100*l.* was not six years old, but the other notes were more than six years old; Mrs. Nash made an indorsement on the 200*l.* note that she had received 5*l.* for interest on it; and the question is whether the payment made under these circumstances has had the effect of taking out of the operation of the statute the 200*l.* note, as to which, but for that payment, any claim would be now barred. The answer to this question will turn on the effect to be given to the circumstances, having reference to the several cases which have been decided, putting a construction on the statute. The Act makes it necessary that there should be a written acknowledgment of the debt, or a payment on account. In the present instance there is no written acknowledgment; but the question is whether the payment made in 1846 does not take the case out of the statute, and this must be treated without reference to that part of Lord TENTERDEN'S Act which requires an acknowledgment in writing.

* The first class of cases that arose related to the effect * 480 to be given to a simple payment of money. In *Tippets v. Heane*, (a) which happened a few years after the passing of the statute, the facts were that 10*l.* was paid to the plaintiff by the direction of the defendant within six years, and it was left to the jury to say whether the payment was made on account of the debt in question: the Court of Exchequer thought that the question ought not to have been left to the jury, because to take a case out of the statute by a payment of money, it must be shown that the payment is made as part payment of a greater debt, and it could not be collected from the fact of the payment of 10*l.* simply that there was a larger debt due. The next case was that of *Waters v. Tompkins*: (b) there the defendant was indebted upon five promissory notes; namely, one for 100*l.* two for 50*l.* and two for 20*l.*; and it was held that a payment of interest on 200*l.* by the wife of the defendant, coupled with what was said upon the occasion, was a payment by the wife as the agent of the husband, and amounted to an admission of a debt on the note of 100*l.* and the two notes

(a) 1 C. M. & R. 252.

(b) 2 C. M. & R. 723.

of 50*l.* The next case was that of *Mills v. Fowkes*, (a) the report of which was supposed to be incorrect; but I have looked into it, and find only a trifling inaccuracy in the statement of some of the figures which in no way affects the present question. The Court there held that there was not such a part payment as took the case out of the statute, according to the principle of the decision in *Tippets v. Heane*: (b) it was a simple payment without any appropriation or evidence of intention to appropriate on the part of the debtor. There was another point in that case; namely, that though

the creditor could not apply the payment to revive his right

* 481 to sue on an old debt * barred by the statute, yet inasmuch

as there was no appropriation by the debtor, the creditor might apply the payments in satisfaction of the debt so barred.

This question, though it does not exactly apply to the present case, applies, however, so far as this, that it proceeds on the principle that a simple payment has not the effect of reviving a debt barred by the statute. Then came the case of *Waugh v. Cope*, (c) of which the facts were these: the plaintiff, an attorney, had done professional business for the defendant in 1827, and several subsequent years, and in July, 1832, the defendant having been a witness on a lunacy inquiry in which the plaintiff was concerned as solicitor, the plaintiff wrote to him to ask what were his expenses on that occasion; the defendant in reply requested the plaintiff to allow what was usual, and place the same to his (the defendant's) account: in March, 1833, the plaintiff wrote to the defendant informing him that the sums allowed were 2*l.* 2*s.* and 10*s.* 6*d.*, enclosing receipts for those sums for the defendant's signature, and concluding, "I will give you credit for the sums in my account against you agreeably to your note of the 21st July last:" the defendant returned the receipts signed by him, and the 2*l.* 2*s.* and 10*s.* 6*d.* were paid to the plaintiff on the production of those receipts: in 1838 the plaintiff delivered to the defendant a bill of costs amounting to 289*l.*, the first item being in 1827, and the two last in 1830 and 1831, and in January, 1839, brought an action on the bill: the Court held that there was not a sufficient payment to take the case out of the operation of the statute, and in this view I concur, for it was impossible to say that the direction by the defendant to place a payment to his account was an admission of a

(a) 5 Bing. N. C. 455. (b) 1 C. M. & R. 252. (c) 6 M. & W. 824.

debt owing by him. The remaining case relied upon was *Burn v. Boulton*. (a) There the plaintiff claimed a sum *from the defendant in respect of money deposited by *482 her with him on the security of a promissory note for the amount: the plaintiff resided in the defendant's family, but in what character was not distinctly shown: to take the case out of the statute the payment of various small sums of money by the defendant to the plaintiff at her request was relied on, and the Court held that it had that effect: what Lord Chief Justice TINDAL said was important, for he held that the payment could not be treated as made in respect of wages, that it did not bear the aspect of charity, and that the only conclusion warranted by the evidence was that it was in respect of the promissory note.

I have thus noticed the cases cited in the argument, because it seemed to be assumed that there was some contradiction between them. I, however, see no difficulty in reconciling them. They show that a simple payment of money does not take a debt out of the statute, and that the payment must be of a smaller sum on account of a larger.¹ What I deduce from them is, that where a payment is made as principal, the effect of it will be to take out of the operation of the statute any debt which is not barred at the time of payment, but that it will not revive a debt which is then barred; and that, where there are several debts, the inference will be that the payment is to be attributed to those not barred. What may be the effect where there is a single debt consisting of several items some of which are barred, and some not, may be doubtful. Exactly the same principle applies if the payment is made in respect of interest. I cannot, therefore, concur in the decision of the Vice-Chancellor. It appears to me in this case that, there being three promissory notes, two barred and one not barred, and a payment made on account of interest generally, this payment must be attributed to the note which was not barred; and *if this were not so, the only effect would be to treat it as *483 a payment on account of all, so that in either case the 200l. note would be kept alive. The result is that the exception ought to have been overruled, and the proper consequential directions given on that footing.

(a) 2 C. B. 476.

¹ See Chitty Contr. (10th Am. ed.) 937 and cases in note (i).

THE LORD JUSTICE KNIGHT BRUCE. — The credible evidence in the present case renders it perfectly clear, that when, in December, 1846, the defendant Mr. Appleton made to Miss Moore (now the plaintiff Mrs. Nash) the payment of 5*l.*, on the effect of which this cause turns, he meant it to be on account of interest at that time due to her, on three, or some or one of three, promissory notes, of which he was one of the makers, and she then the holder; that is to say, two dated before 1841 and one dated in 1841, the last being the foundation of this suit.

Perhaps it may in a sense, by reason of the applicability of the Statute of Limitations in and before December, 1846, to the two earliest of the three notes, be said that on those two notes not any interest was then due. This view of the matter, favourable to the plaintiffs and of course unfavourable to the defendants, is one that, whether accurate or inaccurate, I assume as not to be taken; but it is plain that otherwise than upon the three notes, or some or one of them, there was in December, 1846, no debt for interest, no claim of interest, no possible demand for interest, between Mr. Appleton and Miss Moore. She had not, nor could have had, in her mind any other interest when she addressed to him the request for a payment on account of interest, which produced the payment of the 5*l.*; nor could he, I am satisfied, in making the payment, have intended any thing else.

* 484 * Was it, then, his wish or design when he paid the money, or did he at any time direct or intimate, that it should be applied wholly or in part to the discharge of interest on both or either of the notes dated earlier than 1841? This seems not likely, and is not proved. But, in point of legal inference or legal presumption, was the effect of the payment so? Let it be assumed (though I do not mean to express an opinion) that it would have been so but for what took place after the payment. It is, however, proved that, after the payment but in the course of the same December, Miss Moore declared an intention to attribute, and did attribute, it wholly to interest on the note of 1841, which she was, in the circumstances, authorized and enabled, if not also bound, to do. And the credible evidence renders inevitable the inference, that she never had any other intention with regard to the money.

Was this intention of Miss Moore, was this appropriation by her, liable to be revoked or to be effectually changed by her?

My impression is, that, after the indorsement which in December, 1846, she made upon the note (and I say so without forgetting *Simson v. Ingham*), it was not. But whether that impression is correct or incorrect, it is plain that she did not revoke or change the intention or appropriation, nor (still remembering *Simson v. Ingham*) do I conceive that a communication to Mr. Appleton of this intention or appropriation, proved or affected as it was by the indorsement, was necessary. It must, in my opinion, be taken that, in making the payment, Mr. Appleton virtually directed or virtually authorized its application, by Miss Moore, to the purpose to which she did apply it; and that to the validity or final completeness of that application no further consent on his part, no further knowledge on his part, was requisite.

* It has indeed been conceded substantially as well as * 485 established, that the payment of the 5*l.* did, in December, 1846, satisfy so much of the greater amount of interest, which when that payment was made was due to her on the note of 1841, and that this satisfaction was not inconsistent with any intention existing in the mind either of the debtor paying or of the creditor receiving, when the payment was made. But, nevertheless — and although it is unavoidably conceded also, that, if he had said to her when he made the payment, “I make this payment to you on account of interest on the note of 1841,” the defence of the Statute of Limitations would have been excluded from the present cause, inasmuch as the testatrix Mrs. Smith, one of the makers of the note, was living in and after the year 1846 — the respondents contend that in the actual circumstances it is not so, and an elaborate and able argument for them has endeavoured to convince us that Miss Moore’s power to apply the 5*l.* as she did was one given to her by law, independently of the intention of Mr. Appleton, and that his intention and her appropriation did not go together, and that, therefore, there was in December, 1846, no acknowledgment by him of the debt in question.

I cannot, however, follow the reasoning which leads to such a conclusion as that he did not, in paying the money, intend that appropriation in case she should choose to make it. If a man, having creditors at a distance, transmits a sum to an agent, with authority and directions to him to apply it in or towards paying any one or more or all of the creditors, at the discretion of the agent, who afterwards, in lawful pursuance of the authority, pays

the whole sum to one of the creditors, to whom a larger amount is due; in satisfaction *pro tanto* of the debt, can the debtor subsequently dispute the act, or can it be subsequently said

* 486 effectually by any person that * the payment was not for every civil purpose a payment by the debtor, as much as if he had made it personally? Can the debtor, within six years after the payment, plead successfully the Statute of Limitations to an action for the residue of the debt (a single and entire debt by simple contract, let it be supposed), towards satisfaction of which expressly the agent made the payment? Certainly I apprehend not. And it seems to me that in the present instance the respondents' case cannot, with reason or truth, be stated more favourably for them than by saying that Miss Moore was virtually and in effect the lawfully authorized agent of Mr. Appleton, for the purpose of applying the 5% on his behalf in such manner as she should think fit, subject only to the limitation that she should apply it in or towards paying interest due to her on the 16th of December, 1846, in respect of the three notes, or of some or one of them, which accordingly, in December, 1846, she duly did.

The respondents' argument seems to me to contradict two axioms familiar to us all: one, that a man must be held, in doing an act, to have intended its necessary consequence; the other, that "qui facit per alium facit per se." Certainly the power of application was given to Miss Moore by law, but how? Because the law effectuates a man's reasonable intentions, sufficiently evidenced, as to the disposition of his own property. The law acted here (if I may so express myself) in obedience to Mr. Appleton, as in giving a vendor's or a testator's property to the purchaser or devisee it acts in obedience to the vendor or testator.

A man pays, sends, or delivers money or property of his own to another. That other does not reject, but receives and does not return it. A question afterwards is made as to the title, * 487 interest, or power of the latter in * respect of this money or property. Is not the first point to be ascertained, what was the intention with which the former paid, delivered, or sent it? I apprehend that it is, and that, if that cannot be ascertained by means of direct proof, it must be so by means of circumstantial evidence. He may have meant the money or property as a gift or as a pledge, may have paid, delivered, or sent it by way of trust, or for the purpose of liberating himself wholly or partially from

some obligation, or for some other purpose. But whatsoever his intention in the act, that intention, if lawful, must, being ascertained, prevail, unless the other shall, if entitled to elect, make an election to return or reject the money or property. And though when a debtor, "*ex pluribus causis 'unum debitum' solvit,*" and it is not said "*quod solutum sit,*" "*In arbitrio est accipientis cui potius debito acceptum ferat,*" yet he has that arbitrium because the arbitrium of the debtor was that the creditor should have it. For we know it to be "*In arbitrio solventis dicere quod potius debitum voluerit solutum.*" His silence, and the absence of any proof of intention upon his part, beyond the fact that, owing distinct debts, he pays as a debtor, render it necessary to ascertain his intention specifically and particularly by inference and presumption. The civil law generally drew this inference, made this presumption, in a manner probably more favourable to the debtor than does ours (Ulpian, I think, would bind the creditor "*Ita agere rem debitoris ut suam agerit*"), ours generally, if not always, in such a state of circumstances, holds the creditor authorized to choose which of the debts shall be diminished or paid, if the whole cannot be; and this without regard to their different dates or qualities. But still, according to both systems, it is the declared or presumed intention of the payer in paying that governs.¹ So at least I view them.

* Why, in the present instance, was it (as clearly it was) * 488 impossible for Miss Moore to treat the 5*l.* as a gift to her? Because the intention of the payer in paying, an intention known to her at the time, was otherwise. It was to her "*liberum*" "*non accipere,*" but, receiving, she was bound to effectuate his object, which was lawful; and, when she applied the money in paying interest on the note of 1841, the application was valid only because it had had the sanction of Mr. Appleton, by whom, in the nature of things, as I conceive, the very transaction was an acknowledgment of any debt to which, in a due execution of the authority conferred on her, she applied the money. If no interest, or if interest not amounting to 5*l.* in the whole, had been due from him to her in respect of the note of 1841, upon the 16th of December, 1846, her appropriation of the 5*l.*, as she appropriated that sum, would have been as to the whole or part of it invalid and ineffectual;

¹ See *ante*, 474, n. (1).

because he had authorized, and only authorized, her to appropriate it in or towards paying interest due from him to her; but the appropriation is unavoidably conceded to have been wholly valid and wholly effectual.

Finally, I am of opinion that this controversy stands, for every purpose, on the footing on which it would have stood if Mr. Appleton, in the act of paying the 5*l.* to Miss Moore, had said to her, "I make this payment to you on account of interest due to you on the note in your favour dated in 1841, signed by Mrs. Smith and myself."

We may, I think, therefore well hold the Statute of Limitations to have no place here,—a conclusion which (not reached by me without having considered Clayton's Case, (a) *Mills v. Fowkes*, (b) and the other authorities * cited during the discussion at the bar) contravenes in appearance at least, if not more than in appearance, a judgment that it is impossible not to estimate and respect very highly. I am not convinced, however, that if the question in the cause had seemed to the Vice-Chancellor *res integra*, if he had not thought himself bound by decided cases to give effect to the defence, he would have given effect to it. I will add that, having upon the point before us asked the opinion of a very distinguished lawyer, once on the bench in Westminster Hall, I found his first impression to be one rather of agreement with the order under appeal than of dissent from it; but having, upon his own suggestion, taken time to consider the question, and having, as he informed me, referred to *Holme v. Green*, (c) *Atkins v. Tredgold*, (d) *Tippetts v. Heane*, (e) *Waters v. Tompkins*, (g) *Dowling v. Ford*, (h) *Scholey v. Walton*, (i) *Cleave v. Jones*, (k) and *Bamfield v. Tupper*, (l) he arrived ultimately at the same conclusion with myself, and I may say substantially by the same course. That conclusion is, I repeat, in favour of these plaintiffs' title to a decree, notwithstanding a defence which I should not have thought particularly creditable, even if it had not, as it has, been attempted to be supported by swearing of a most incorrect description.

(a) 1 Mer. 572.

(b) 5 Bing. N. C. 455.

(c) 1 Stark. 488.

(d) 2 B. & C. 28.

(e) 1 C. M. & R. 252.

(g) 2 C. M. & R. 723.

(h) 11 M. & W. 329.

(i) 12 M. & W. 510.

(k) 6 Exch. 573.

(l) 7 Exch. 27.

The plaintiffs' costs of the exceptions of the last hearing before the Vice-Chancellor and of the appeal should, as it seems to me, be costs in the cause.

THE LORD JUSTICE TURNER. — If the question in this case had, in my judgment, depended * upon the appropriation by * 490 the creditor of the sum of 5*l.* paid for interest, I should have very much inclined to concur in opinion with the Vice-Chancellor, that the appropriation did not furnish sufficient ground to raise an implied promise on the part of the debtor to pay the particular debt on which this suit is founded. The cases at law which were cited in the course of the argument appear to me to establish that point, and I do not feel disposed to dissent from those cases or from the reasoning on which they are founded. I take it to be now settled at law, that the implied promise which the law raises to pay a debt barred by the Statute of Limitations is a new promise.¹ Such a promise cannot be made without an intention on the part of the debtor to make it, and, speaking with the diffidence which I most sincerely feel in consequence of the different opinion which my learned brother has expressed upon the point, I much incline to think that such an intention on the part of the debtor ought not to be inferred from an act done by the creditor in pursuance of the power which the law gives him to appropriate a payment not appropriated by the debtor.

It seems to me, however, that although an appropriation by a creditor may not furnish sufficient ground to raise an implied promise on the part of the debtor to pay the debt, to which the payment is appropriated by the creditor, it does not exclude the consideration of other circumstances, from which the intention of the debtor in making the payment may be collected. If we reject the appropriation as evidence of the intention of the debtor, we are, I think, entitled, if not bound, to inquire what other circumstances there may be from which that intention may be proved or presumed; for I apprehend that, in the case of several debts, the presumed intention is to be regarded.

* It is upon this ground I dissent from the opinion of * 491

¹ Chitty Contr. (10th Am. ed.) 937; Pond v. Williams, 1 Gray, 630; White v. Jordan, 27 Maine, 370, 379 and cases cited; Jones v. Jones, 21 N. H. 219; Whipple v. Stevens, 22 N. H. 226; State Bank v. Woody, 5 Eng. 638; Arnold v. Downing, 11 Barb. 554; Smith v. Simms, 9 Geo. 418.

the Vice-Chancellor in this case. At the time when the payment, the effect of which we have to consider, was made, there were three debts carrying interest. The payment was for interest, and it must have been for interest on all or some or one of these debts. Two of the debts were then barred by the Statute of Limitations, and we cannot therefore, as I think, presume that the payment was made by the debtor specifically for interest on those two debts, or either of them. If not, it must have been made for interest on all the debts, or on the debt upon which this suit is founded, and in either case this particular debt must be taken out of the operation of the statute. Upon this ground my opinion is, that the bill in this cause ought not to have been dismissed, but that the plaintiff was entitled to the usual creditor's decree.

* 492 * BEAVAN v. THE EARL OF OXFORD.

1855. November 14, 23. Before the Lord Chancellor Lord CRANWORTH and the LORDS JUSTICES.

A., B., and C. were judgment creditors of D., A. and B. having priority to C.:

A. and B. subsequently omitted to register their judgments within five years from their previous registration: C. duly registered within the five years:

Held, that A. and B. did not thereby lose their priority to C.

The effect of the provisions of the 4th section of the Act 2 & 3 Vict. c. 11, is to deprive the judgment creditor who omits to re-register within five years of protection against subsequent purchasers, mortgagees, and creditors, but not to alter his position as to previous purchasers, mortgagees, and creditors.

The circumstance that a re-registration is not within five years from the previous registration does not make it ineffectual as against subsequent purchasers, mortgagees, and creditors.

The decision in *Shaw v. Neale*, 20 Beav. 157, as to the effect of omitting to re-register within five years, observed upon and in substance overruled.¹

THE question in this case related to the order of priority of three judgment creditors of the late Earl of Oxford named respectively David Taylor, Thomas Brockell, and George Keates Corfield, and

¹ *Shaw v. Neale* has been reversed in the House of Lords, and the law on this point is settled. 6 H. L. Cas. 581; see Sugden V. & P. (14th Eng. ed.) 530 *et seq.*; 2 Dan. Ch. Pr. (4th Am. ed.) 1033 *et seq.*

arose by way of appeal from a certificate made in chambers on a reference directed in the suit, which had been instituted to settle the rights of the creditors of the Earl of Oxford.

D. Taylor's judgment bore date the 29th December, 1836, before the passing of the Act 1 & 2 Vict. c. 110, and was duly docketed; it was registered on the 27th January, 1849, and re-registered (within five years) on the 26th January, 1854.

T. Brockell's judgment bore date the 23d June, 1841; it was registered on the 19th August, 1841, re-registered on the 27th February, 1847, and again (after five years) on the 20th April, 1852.

G. K. Corfield's judgment bore date the 4th September, 1848; it was registered on the 5th September, 1848, and re-registered (after five years) on the 28th November, 1854.

* Under these circumstances T. Brockell and G. K. Cor- * 493
field had in the year 1849 priority over D. Taylor, and the question was whether they lost that priority by not having re-registered within five years. The chief clerk decided that they had not lost their priority, and certified the priorities accordingly, and the question now came at once before the full Court of appeal on an appeal from the certificate brought by D. Taylor.

It should here be mentioned that the bill in the suit was filed on the 20th August, 1849, D. Taylor being made a defendant and the bill containing statements as to the judgments of Brockell and Corfield: the decree in the suit was made on the 9th June, 1854.

The question now brought before the Court turned mainly on the construction of the 19th section of the Act 1 & 2 Vict. c. 110, and the 4th section of the Act 2 & 3 Vict. c. 11.

The 19th section of the Act 1 & 2 Vict. c. 110, is as follows:
“ Provided always, and be it further enacted, that no judgment of any of the said superior Courts, nor any decree or order in any Court of Equity, nor any rule of a Court of Common Law, nor any order in bankruptcy or lunacy, shall by virtue of this Act affect any lands, tenements, or hereditaments as to purchasers, mortgagees, or creditors, unless and until a memorandum or minute containing the name and the usual or last-known place of abode, and the title, trade, or profession of the person whose estate is intended to be affected thereby, and the Court and the title of the cause or matter in which such judgment, decree, order, or rule shall have been obtained or made, and the date of such judgment,

decree, order, or rule, and the account of the debt, damages,
 * 494 costs, or moneys thereby recovered or ordered to * be paid,
 shall be left with the senior Master of the Court of Common
 Pleas at Westminster, who shall forthwith enter the same particu-
 lars in a book in alphabetical order by the name of the person
 whose estate is intended to be affected by such judgment, decree,
 order, or rule; and such officer shall be entitled for any such
 entry to the sum of five shillings; and all persons shall be at lib-
 erty to search the same book on payment of the sum of one shil-
 ling.”

The 4th section of the Act 2 & 3 Vict. c. 11 is as follows:
 “And be it enacted, that all judgments of any of the superior
 Courts, decrees or orders in any Court of Equity, rules of a Court
 of Common Law, and orders in bankruptcy or lunacy, which since
 the passing of the said recited Act of the first and second years of
 the reign of her present Majesty have been registered under the
 provisions therein contained, or which shall hereafter be so regis-
 tered, shall, after the expiration of five years from the date of the
 entry thereof, be null and void against lands, tenements, and other
 hereditaments as to purchasers, mortgagees, or creditors, unless a
 like memorandum or minute as was required in the first instance
 is again left with the senior Master of the said Court of Common
 Pleas within five years before the execution of the conveyance,
 settlement, mortgage, lease, or other deed or instrument vesting or
 transferring the legal or equitable right, title, estate, or interest in
 or to any such purchaser or mortgagee for valuable consideration,
 or as to creditors, within five years before the right of such credi-
 tors accrued, and so, *toties quoties*, at the expiration of every suc-
 ceeding five years; and the senior Master shall forthwith re-enter
 the same in like manner as the same was originally entered; and
 such officer shall be entitled for any such re-entry to the sum of
 one shilling.”

* 495 * *Mr. Eddis*, for D. Taylor, supported the appeal.—

He submitted that Brockell's judgment by reason of not
 being re-registered within the five years was to be treated as bear-
 ing the date of the re-registration, namely the 20th April, 1852;
 and that in like manner Corfield's judgment must be treated as
 being dated the 28th November, 1854; and that thus Taylor's judg-
 ment would have a priority over both. He referred to the sections

of the two Acts before mentioned, and also to the 13th section of the 1 & 2 Vict. c. 110, the 2d section of 3 & 4 Vict. c. 82, and the 4th, 5th, 6th, and 8th sections of the 18 Vict. c. 15, and supported the construction of them which would give priority to Mr. Taylor by reference to the following cases; namely, *Shaw v. Neale*, (a) *Beere v. Head*, (b) *Freer v. Hesse*, (c) and also to Lord St. Leonards's Concise View of the Law of Vendor and Purchaser, p. 389. He submitted that any notice which D. Taylor obtained of the other judgments by means of the bill was immaterial, if the provisions of the Acts as to registration had not been complied with.

Mr. Walker, for G. K. Corfield, supported the decision of the chief clerk. — The question turns upon the 4th section of the Act 2 & 3 Vict. c. 11, and it is submitted that neither the words of the section, nor the object of the statute, nor the reason of the thing, warrant such a construction as would give to the appellant the priority which he claims. The re-registration of Taylor's judgment was idle so far as Corfield was concerned, it was useful only as against * subsequent purchasers. In order * 496 to bring the section in question into operation, there must be purchasers, mortgagees, or creditors who being duly registered themselves can assert that at the date of their purchases, mortgages, or debts they found no judgment registered within five years, and the section settles their priority with regard to competing creditors of the class mentioned in the section who have neglected to register. The object of the Act was to reduce the time within which purchasers, mortgagees, and creditors were to search. In the present case, when Mr. Corfield registered, the register was vacant, and the question of priority as between him and Taylor must be referred to the time when Taylor originally registered. The Act was clearly meant to apply to persons becoming purchasers, mortgagees, and creditors after the expiration of the five years, not to persons who became such within that period. The analogous provisions in the Irish Act, 9 Geo. 4, c. 35, have received the interpretation now contended for. *Hickson v. Collis*. (d) The case of *Freer v. Hesse* (c) does not apply, and the decision in *Shaw v.*

(a) 19 Jur. 666; since reported 20 Beav. 157.

(b) 3 Jones & Lat. 340.

(c) 4 De G., M. & G. 495.

(d) 1 Jones & Lat. 94 and S. C. on rehearing 10 Ir. Eq. 447.

Neale (a) supports the view now submitted. As to notice, the Act 3 & 4 Vict. c. 82 does not apply to the present case; it has no reference to the re-registration of judgments under the Act 2 & 3 Vict. c. 11. The old rule of the Court must therefore prevail, and under this Taylor being clearly affected with notice must be postponed to Corfield. The only remaining question is as to the 6th section of the Act 18 & 19 Vict. c. 15. It is, however, submitted that that section really makes no difference; it was passed simply for the purpose of removing a doubt whether a person who had permitted the five years to elapse could avail himself of the provisions of the Act 2 & 3 Vict. c. 11 as against subsequent mortgagees and purchasers. The 4th and 5th sections of the Act 18 & 19 Vict. c. 15 do not affect Mr. Corfield inasmuch as they are not retrospective.

Mr. Wickens, for T. Brockell, supported the decision of the chief clerk, and adopted the argument used on behalf of Mr. Corfield.

Mr. Eddis replied. — He submitted that the governing spirit and principle of the Act 2 & 3 Vict. c. 11 was to give priority according to the date of registration, and to limit its application for this purpose to purchasers, mortgagees, and creditors after the five years was manifestly inconsistent with its provisions as to re-registration; that Taylor by obtaining a fresh judgment might have clearly got the priority now disputed, and his forbearance to call in his judgment was entitled to the same protection. He further submitted that the adoption of the construction contended for on the other side would lead to this anomalous result; namely, that as between three judgment creditors A., B., and C., A. might stand before B., and B. before C., and yet A. stand after C.

November 28.

THE LORD CHANCELLOR. — The question for our decision is as to the priority of certain judgments recovered against the late Earl of Oxford, and it turns on the true construction of the 1 & 2 Vict. c. 110, § 19, and the 2 & 3 Vict. c. 11, §§ 2 and 4 [His Lordship here read the several sections].

* 498 * It has been contended by *Mr. Eddis*, that the judgment recovered by his client Mr. Taylor had precedence over

(a) 19 Jur. 666; since reported 20 Beav. 157.

both the others with whom he was competing. Taylor's judgment was recovered in the year 1836 before the passing of the 1 & 2 Vict. c. 110; but it was first registered on the 27th of January, 1849, and it was re-registered on the 26th of January, 1854, within five years. Brockell, one of the competing creditors, recovered his judgment in June, 1841, and duly registered it on the 19th of August in that same year: he again registered it on the 27th of February, 1847, and again on the 20th of April, 1852. Corfield, the other competing creditor, recovered his judgment on the 4th of September, 1848, and registered it on the next day; he re-registered it on the 28th of November, 1854. The question argued before us was whether Taylor's judgment took precedence of the other two.

It was contended on behalf of Mr. Taylor that though when he first registered his judgment, on the 27th of January, 1849, Corfield, whose judgment was registered in September, 1848, and (subject to an observation I will presently advert to) Brockell, whose judgment was registered in February, 1847, had by the statute precedence over him, yet that that precedence was lost when within five years after the 27th of January, 1849, they suffered more than five years to elapse from the dates of their respective registrations. The meaning of the statute, it was argued, was to postpone every judgment creditor who should omit within five years to re-register, and so at the end of that period to give priority to all judgment creditors then duly appearing on the registry. This is not the construction which I put on the Act. The object of the enactments was to give security to purchasers, mortgagees, and creditors by enabling them to ascertain whether the lands of the person from whom they are purchasing or taking a mortgage or judgment are subject to any prior * judgment. * 499 If a judgment once registered were to bind a subsequent purchaser after any lapse of time, the search must be indefinite, and must necessarily occasion great and almost insuperable difficulties. To obviate this the statute provides that no intended purchaser, mortgagee, or creditor need search for more than five years, requiring at the end of that time re-registry in order to affect purchasers, mortgagees, or creditors.

The question is, What is the effect of an omission to re-register in its operation on previous purchasers, mortgagees, or creditors? I think it has no operation at all. When once a person has become

a purchaser, mortgagee, or creditor with notice on the register of an existing judgment, he knows that such a charge exists, and has no shadow of complaint if it is enforced. The object of the statute was to enable him to ascertain with certainty what judgments exist, not to give him a chance of improving his title by the possible subsequent neglect of a judgment creditor to re-register. Such neglect will of course deprive the judgment creditor of his rights against subsequent purchasers, mortgagees, or creditors becoming so before any re-registry has taken place, and so will operate as a protection to them; but there could be no object in protecting those who had thought fit to become purchasers, mortgagees, or creditors in spite of a judgment of which the register had already apprised them. A person who has completed his title as purchaser before re-registry is not a purchaser within the meaning of the enactment. Every owner of land, not deriving his title by descent, has been at some time or other a purchaser; but the statute refers only to those who become purchasers after the dates fixed for registry or re-registry, as is apparent from the language of the 4th section of the 2 & 8 Vict. c. 11, requiring re-registry within five years before the execution of the deed or instrument transferring the legal or equitable rights to the purchaser or mortgagee, or as to creditors within five years before the right of such creditors accrued. When such re-registry has once been completed it never can be repeated so as to comply with the exigency of the statute as to transactions already perfected. The sole object of registering and re-registering is to enable persons intending to become purchasers, mortgagees, or creditors to ascertain how far it may be prudent in them to do so having regard to existing judgments. When once the transaction, whether of purchase, mortgage, or loan, has been completed, the necessity for a register has to those interested in such completed transactions altogether ceased. My opinion therefore is that, treating Brockell and Corfield as being both duly on the register within five years prior to January, 1849, when Taylor first registered his judgment, they had a priority which was not affected by their subsequent omission to re-register at the end of five years.

It was, however, contended as to Brockell that he was not duly registered, for his original registration was in August, 1841, and he did not register again till 1847, that is, till more than five years had elapsed; and it was suggested that, according to the express

language of the fourth section of the 2 & 3 Vict. c. 11, the re-registration must be made within five years, and cannot be validly made afterwards. I think, however, that this is a narrow and unnecessarily restricted construction of the clause. The re-registration certainly must be made before or at the expiration of every five years in order to give complete security to the judgment creditor, for otherwise he may be postponed to purchasers, mortgagees, or creditors becoming so after the lapse of the five years and before re-registration; but there is no reason in favour of purchasers, mortgagees, or creditors for holding that as against them re-registration is invalid, because it is not made so soon as for the protection * of the party registering it ought to have been * 501 made. I therefore think that Brockell's re-registration in 1847 and 1852 was good against those who claim by a title accruing within five years after those dates respectively. All doubt on this point is now removed by 18 & 19 Vict. c. 15, § 6; but I own I think that enactment, though convenient for the purpose of obviating doubts, was not necessary.

It remains to consider what previous authorities there are bearing on the subject. The judgment of Lord ST. LEONARDS in *Hickson v. Collis*, (a) though it related not to this statute but to an Act having a similar object as to Ireland, bears directly on the question. The 9 Geo. 4, c. 35, is entitled "An Act to protect purchasers for valuable consideration in Ireland against judgments not revived or redocketed within a limited time;" and the first section enacts that all judgments which, after the passing of the Act, should be recovered in Ireland, should be void against purchasers unless redocketed within twenty years next before the execution of the deed or instrument transferring the legal or equitable rights to a purchaser: the case itself related to a judgment recovered many years before the passing of the statute, and the argument turned mainly on the effect of the 2d and 3d clauses of the Act, but in his judgment Lord ST. LEONARDS gives his opinion as to the construction of the 1st section as follows: (a) "The provisions of the first section are, certainly, not so plain as they might have been; but they are plain enough to legal comprehension,—that all judgments thereafter to be entered shall, after the expiration of twenty years from the entry thereof, be

(a) 1 J. & Lat. 94; see p. 113.

void as against purchasers for value, unless redocketed within twenty years before the execution of the conveyance to the purchaser. * 502 What was the object of the Act? To give notice of the judgments affecting the estate to the purchaser. How long was the protection of the judgment creditor to endure? For twenty years. Would the entry of the judgment contain the same particulars as the entry of the redocketing? Was it equally accessible? In all respects it was the same. Then why should the formality of redocketing the judgment the next hour after its entry be gone through? When the Act says that the judgment entered shall be void after twenty years, it not only limits the period during which the judgment shall be good, but it also limits the period within which it is not necessary to do any other act to give it validity; and the true construction appears to be that, as to purchasers becoming such after the first period of twenty years expires, there must be a redocketing; but that if once a purchaser is affected by a judgment under the first section, he cannot, at any future time, derive protection from the Act. The Act does not require that the judgment creditor shall every twenty years revive or redocket his judgment, in order that it may be valid against a conveyance made within twenty years after its entry or redocketing; but he must redocket it, if he mean to bind purchasers who became such after the expiration of the first period of twenty years, and before the expiration of twenty years from the entry of the redocketing. By the entry or the redocketing of the judgment, he binds all those who become purchasers within twenty years after such entry or redocketing; but to bind those who become purchasers after that time, he must, every twenty years, redocket his judgment; and such redocketing will give validity to his judgment as against all persons who shall become purchasers during twenty years next after the entry of such redocketing." I subscribe to that view of the subject, which * 503 is precisely * applicable to the English statute, and affords, as I think, a safe guide in conducting us to a proper conclusion.

I am aware that the Master of the Rolls seems to have taken a different view of the subject in the recent case of *Shaw v. Neale*. (a) It does not, however, appear that the Irish case was

(a) 19 Jur. 666; since reported 20 Beav. 157.

brought under the consideration of his Honor. There the judgment was obtained and registered in January, 1841; Remnant obtained a mortgage from Neale, the judgment debtor, in 1844, and the judgment creditor did not re-register his judgment till after five years from the original registry; namely, in November, 1846. His Honor decided that Remnant was to hold his mortgage free from the judgment. This was a decision at variance with what Lord St. LEONARDS stated in the case I have referred to, and which seems to me more in unison with the spirit and language of the enactment than the construction adopted by his Honor. It does not appear to have been pointed out in argument, that the provisions of the statute never can be complied with as to mortgages complete before the re-registry. It is impossible to re-register within five years previously to the date of the deed creating a mortgage prior to the re-registration.

On these grounds, I have come to the conclusion that Taylor is to be ranked after Brockell and Corfield, both whose judgments had been placed on the registry less than five years previous to the month of January, 1849, when Taylor first registered his judgment.

THE LORD JUSTICE KNIGHT BRUCE. — In the controversy before the Court, I think that the * questions as to notice * 504 and the *lis pendens* are not material, and I doubt whether, according to the true interpretation of the statute law, Mr. Taylor is not entitled to the preference that he seeks. But as the Lord Justice TURNER takes the same view of the case with the Lord Chancellor, my doubt is unimportant.

THE LORD JUSTICE TURNER. — There are in this case three judgments: First, the judgment of the appellant Taylor, which was obtained in the month of December, 1836, registered on the 27th of January, 1849, and re-registered on the 26th of January, 1854, within the period of five years mentioned in the Statute 2 & 3 Vict. c. 11, § 4; secondly, the judgment of the respondent Brockell, which was obtained on the 23d of June, 1841, registered on the 19th of August in that year, prior therefore to the registration of the appellant's judgment, and since twice re-registered, on the 27th of February, 1847, and the 20th of April, 1852, on each occasion, therefore, after the expiration of the above-mentioned

period of five years ; and thirdly, the judgment of the respondent Corfield, which was obtained on the 4th of September, 1848, registered on the 5th of the same month of September, also prior to the registration of the appellant's judgment, and re-registered on the 28th of September, 1854, also after the expiration of the five years. The question before us is whether, under these circumstances, the judgment of the appellant Taylor is entitled, under the provisions of the statutes relating to the registration of judgments, to priority over the judgments of the respondents Brockell and Corfield.

This question seems to me to depend wholly upon the enactment contained in the Statute 2 & 3 Vict. c. 11, § 4, * for
 * 505 the Statute 3 & 4 Vict. c. 82, § 2, relates only to the effect of notice ; and the Statute 18 & 19 Vict. c. 15, although it defines the circumstances under which re-registered judgments are to be binding, does not appear to me otherwise to alter the persons who are to be bound by them. The 4th section of 2 & 3 Vict. c. 11, is as follows : [His Lordship read the section set out above.]

The question now raised upon this section is, whether a judgment prior on the registry, but not duly re-registered, is, by the section, made void against a subsequent judgment, which has been duly re-registered ; for there is nothing to take away the priority of the antecedent judgment, unless this section has made it void against the subsequent one. My opinion has fluctuated upon this point ; but the conclusion at which I have ultimately arrived is, that the enactment has no such operation. The section may well be divided into two parts, — the first part enacting that registered judgments shall be void after the expiration of five years, unless re-registered ; the second part providing the means by which they may be kept on foot after that period has expired. It is clear that the words “ purchasers,” “ mortgagees,” and “ creditors,” as used in this second part of the section, were meant to apply and can apply only to purchasers, mortgagees, and creditors becoming so subsequently to the date of the registered judgment ; and I think that it would not be a sound construction of the statute to give a more extended construction to the same words as used in the first part of the section. To read the words “ purchasers,” “ mortgagees,” and “ creditors,” in the first part of the section as extending both to antecedent and subsequent purchasers, mortgagees, and creditors, when, in the latter part of the same section, they

must be read as applying to subsequent purchasers, mortgagees, and creditors only, is in itself no little difficulty; but the case * presents a still further difficulty. We are here dealing with judgments, which are charges upon estates, and if this enactment makes an antecedent judgment not duly re-registered null and void against a subsequent judgment, its operation will be not only to convert a right to foreclosure into a mere right to redeem, but, if full effect be given to the words of the enactment, absolutely to destroy the right of redemption; and surely a very strong and clear expression of the intention of the legislature must be required for such purposes.

For these reasons, I think that the true meaning of this enactment is that judgments not duly re-registered shall be void against subsequent purchasers, mortgagees, and creditors; and this construction, as it seems to me, will work out the purposes of the Act. Each purchaser, mortgagee, or creditor will be bound to search only for five years; and judgments not registered or re-registered within that period will be void against him. The case of *Shaw v. Neale*, (a) referred to in the argument, does not, I think, apply to the present. The mortgage in that case was subsequent to the judgment, and the statute therefore, as I construe it, rendered the judgment void against the mortgagee.

My opinion therefore is that the certificate of the chief clerk in this case is right, and that this motion must be refused; but I think it should be refused without costs, except as to No. 6, whose costs must be paid by the appellant.

* BEAVAN v. THE EARL OF OXFORD.

* 507

1856. January 22, 23, 29. Before the Lord Chancellor Lord CRANWORTH and the LORDS JUSTICES.

In a suit to settle the priorities of incumbrancers on a testator's estate, the chief clerk by his certificate found a voluntary settlement ranking 1, and A. and B. judgment creditors ranking 2 and 3, but he also found that B.'s judgment, which was before the Act 1 & 2 Vict. c. 110, was of prior date to

(a) 20 Beav. 157.

the voluntary settlement: *Held*, that although as between A. and B. the former upon a question of registration was entitled to priority, yet that independently of such question, and having regard to the date of the voluntary settlement and to the provisions of the 6th section of the Act 2 Vict. c. 11, B. was prior both to the voluntary settlement and to A.

A judgment creditor is not a purchaser within the meaning of the Statute 27 Eliz. c. 4, and has therefore no title on that ground to set aside a prior voluntary settlement.

The 13th section of the Act 1 & 2 Vict. c. 110 does not confer on the judgment creditor any right against a person claiming under a voluntary settlement previously made by the judgment debtor.

The decision in *Watts v. Porter*, 3 E. & B. 743, observed upon.¹

THE question raised in this case related to the priorities of certain judgment creditors of the late Alfred, Earl of Oxford. The suit was instituted in 1849, by H. W. Beavan, a mortgagee, against the late earl, and various persons, being mortgage, annuity, and judgment creditors, praying that the plaintiff might be declared entitled to redeem such incumbrances of the defendants as were prior to his mortgage, and that all proper accounts might be taken.

Various proceedings were had in the suit, the plaintiff and the earl both dying before it came to a hearing. By a decree made by Vice-Chancellor STUART at the hearing of the cause, and dated the 9th June, 1854, a certain indenture dated the 3d July, 1838, for securing an annuity of 2000*l.* for the benefit of the Countess of Oxford, who was a defendant to the suit, was as against the late plaintiff and against such of the defendants, being mortgagees and incumbrancers on the life-estate of the late Earl of Oxford, as were purchasers for valuable consideration declared to be void, and

various accounts and inquiries were directed, and among
* 508 them an account * of what was due for principal, interest, and costs properly incurred (other than the costs of the suit) upon the several securities of the late plaintiff and of the several defendants respectively who were entitled to or interested in the securities, charges, and incumbrances, mentioned in the bill, and an inquiry as to the priorities of the said several securities.

The chief clerk made his certificate, dated the 12th June, 1855, and thereby answered the various inquiries directed, and set forth

¹ See *Lewin Trusts* (5th Eng. ed.), 199, n. (c), 576.

in a schedule to his certificate the priorities of the several securities with the names of the parties to whom the amounts due ought to be paid. The schedule was to the following effect: First, the sum of 2054*l.* 16*s.* 4*d.* to the representatives of the late plaintiff upon an indenture of mortgage dated the 19th December, 1842; second, the sum of 7766*l.* 13*s.* 4*d.* to the trustees of the indenture of settlement of the 3d July, 1838, being the arrears of the annuity of 2000*l.* thereby secured for the benefit of the Countess of Oxford; third, the sum of 58*l.* 17*s.* 1*d.* to Duncan Anderson on a judgment obtained on the 4th December, 1841, registered the 17th April, 1845, and re-registered the 13th March, 1854; fourth, the sum of 306*l.* 0*s.* 4*d.* to Thomas Brockell on a judgment obtained on the 23d June, 1841, registered the 19th August, 1841, and re-registered the 27th February, 1847, and the 20th April, 1852; fifth, the sum of 850*l.* to G. Keates Corfield on a judgment obtained on the 4th September, 1848, registered the 5th September, 1848, and re-registered the 28th November, 1854; sixth, the sum of 70*l.* 7*s.* 6*d.* to Charles Layton on a judgment obtained on the 23d December, 1848, registered the same day and re-registered the 21st December, 1853; seventh, the sum of 1066*l.* 19*s.* 6*d.* to David Taylor on a judgment obtained on the 29th December, 1836, registered the 27th January, 1849, and re-registered the 26th January, 1854; * and eighth, a sum of 159*l.* 17*s.* 2*d.* to * 509 Robert Cook on a judgment obtained on the 12th January, 1849, registered the 7th February, 1849, and re-registered the 29th November, 1854.

The chief clerk by his certificate stated that the priorities of the securities were as before mentioned, "except that as regards the incumbrancer David Taylor the judgment forming the foundation of his claim being dated prior to the indenture of settlement, being the security of the second incumbrancer, such last-mentioned incumbrance was in effect subsequent to the incumbrance of the said David Taylor, and could not be sustained against his claim."

Various other proceedings took place in the suit, and, by an order made on the 30th July, 1855, the sum due to the late plaintiff on the first of the securities mentioned in the certificate was discharged out of moneys paid into Court in the suit. Among other proceedings were two separate motions to vary the chief clerk's certificate, the one by D. Taylor to obtain priority over T.

Brockell and G. K. Corfield, and the other by G. K. Corfield to obtain priority over the indenture of settlement of the 3d July, 1838. The first of these was disposed of by the decision above reported, see *ante*, p. 492, which affirmed the order of priority given by the chief clerk's certificate. The claim of G. K. Corfield was compromised by the trustees of the settlement, and the benefit of his security agreed to be assigned to them.

A petition was then presented by the Countess of Oxford, as interested in the estate of the late earl, for the purpose of having the funds in Court applied in payment of the incumbrances
 * 510 according to their priority ; * and this gave rise to the question now brought before the Court. The petition came on for hearing before Vice-Chancellor STUART, but his Honor directed it to be at once taken to the Lords Justices, who, when the matter was brought under their notice, arranged for its being heard by the full Court of appeal ; they also on the application of D. Anderson and C. Layton gave leave to those parties to appeal against the chief clerk's certificate, the proceedings which had taken place on the appeals of D. Taylor and G. K. Corfield having induced them to abstain from taking any steps previously. The case now came on for hearing accordingly.

Mr. Bacon and *Mr. Speed*, for the petitioner Lady Oxford. — They relied on the certificate of the chief clerk, which remained undisturbed, as regulating the rights of the parties ; acting on this, priority must be given in now distributing the fund to D. Taylor over the settlement of the 3d July, 1838, and the other judgment creditors ; and this would be quite consistent with the decision which in reference to the question of registration had upheld the order in which the judgment creditors were placed *inter se* by the certificate of the chief clerk.

Mr. Lee and *Mr. Chichester* appeared for the trustees of the settlement.

Mr. Walker, for D. Anderson and C. Layton, the judgment creditors placed third and sixth in the schedule to the chief clerk's certificate. — He submitted that there was nothing to prevent his

clients questioning the propriety of the certificate on the * present occasion : *Adams v. Claxton*, (a) *Brodie v. Barry*; (b) that the chief clerk had drawn an erroneous conclusion as to priority, and that he ought to have postponed the claims of the trustees of the settlement to the judgments now in question. He rested his case on four grounds: First, by the first and fifth sections of the Act 27 Eliz. c. 4, the settlement was void as against judgment creditors who were to be considered as purchasers, the word purchaser having received a liberal construction, as for instance in the case of a lessee at rack-rent. *Goodright v. Moses*. (c) [See also Vin. Ab. tit. "Fraud," K. (2), and *Hill v. The Bishop of Exeter*, (d) *Girling v. Lowther*, (e) *Garth v. Ersfeild*, (g) *Finch v. Earl of Winchelsea*, (h) *Barton v. Vanheythuyssen*, (i) *Whitworth v. Gaugain*. (k)]

[The Lord Justice TURNER referred to *Brace v. Duchess of Marlborough*. (l)]

Secondly, if there was any doubt whether, under the 27 Eliz. c. 4, the settlement was void, there could be no doubt but that it was void by the joint operation of that statute and of the Act 1 & 2 Vict. c. 110. Under the latter Act it had been decided that a judgment creditor became an equitable mortgagee and was entitled to an interest in the land, and having a power might exercise it without the assent of any other party. The decision of the Queen's Bench in *Watts v. Porter* (m) had a direct bearing on the present case. [See also *Rolleston v. Morton*, (n) *Brearcliff v. Dorrington*, (o) *Dunster v. Lord Glengall*. (p)] Thirdly, on the general principles * of this Court when there was a fund to * 512 be administered, and the legal interest was in the hands of trustees, a party claiming for value was preferred. *Buckle v.*

(a) 6 Ves. 226.

(b) J. & W. 470.

(c) 2 W. Black. 1019.

(d) 2 Taunt. 69.

(e) 2 Ch. Rep. 136.

(g) Sir J. Bridgman's Reports, 22.

(h) 1 P. W. 277.

(i) 11 Hare, 126.

(k) 3 Hare, 416; 1 Phil. 728.

(l) 2 P. W. 491.

(m) 3 E. & B. 743.

(n) 1 Dru. & W. 171.

(o) 4 De G. & S. 122.

(p) 3 Irish Ch. 47.

Mitchell. (a) Fourthly, the settlement was void under the Act 13 Eliz. c. 5, being with a view to delay creditors.

[The Lord Chancellor referred to *Lush v. Wilkinson.* (b)]

It was not necessary to show insolvency at the time. *Richardson v. Smallwood.* (c) Assuming, however, that the Court was against the present contention on all these points, the remaining question was between D. Taylor and D. Anderson and C. Layton, and it was submitted as clear that they ought to be preferred to D. Taylor. By the second section of the Act 2 Vict. c. 11, D. Taylor's judgment was void as against the other two because not registered, and the settlement could make no difference as to reviving that which, as against those parties being purchasers for value, had been declared void: Lady Oxford being a volunteer had not the same right. [He referred to *Eland v. Eland* (d) and *French v. French.* (e)]

Mr. Cory, who was with *Mr. Walker* for C. Layton, cited *Lord Townshend v. Windham*, (g) *Peacock v. Monk*, (h) *Brodie v. Barry*, (i) to show that Lady Oxford could only be entitled to one year's arrears of her annuity.

Mr. Surrage was with *Mr. Walker* for D. Anderson.

Mr. Wickens, for T. Brockell. — He submitted that by the * 513 decision already pronounced * T. Brockell was entitled to stand before D. Taylor; and he cited *Eland v. Eland*, (k) *Lyon v. Colville.* (l)

Mr. Craig, with whom was *Mr. Eddis*, for D. Taylor, was proceeding to contend in support of his right to priority, when he was stopped by the Court.

THE LORD CHANCELLOR. — We have no doubt whatever that D. Taylor is entitled to priority over the other judgment creditors,

(a) 18 Ves. 100.

(b) 5 Ves. 384.

(c) Jac. 552.

(d) 1 Beav. 235; 4 Myl. & Cr. 420.

(e) 19 Jur. 840.

(g) 2 Ves. 1.

(h) 2 Ves. 190.

(i) 2 V. & B. 36.

(k) 1 Beav. 235.

(l) 1 Coll. C. C. 449.

and over Lady Oxford's trustees. Before the passing of the Statute 1 & 2 Vict. c. 110, D. Taylor had entered up his judgment, so that, according to the law as it then stood, he had as against Lord Oxford a good title to a lien. The statute in question was passed in the latter part of the year 1838, and before that time the voluntary settlement had been made; that, however, as against D. Taylor was nothing but a settlement subject to his rights. Then in the next year the Statute 2 Vict. c. 11 was passed, and it is the second section of that Act which alone gives rise to any doubt, but the doubt is quite removed by reference to the sixth section.

The second section says, that no judgment already docketed and entered under the recited Act (4 & 5 Will. & M. c. 20) shall after the 1st August, 1841, affect any lands, tenements, or hereditaments as to purchasers, mortgagees, or creditors unless and until such memorandum or minute thereof as is prescribed in the Act 1 & 2 Vict. c. 110 shall be left with the senior Master of the Court of Common Pleas. It was on this said that D. Taylor's judgment was not to affect lands, tenements, or hereditaments unless and until the memorandum should be left * as thus directed, * 514 and that the memorandum was not left until after the registration of subsequent judgments. But then the sixth section provides that nothing in the recited Act (1 & 2 Vict. c. 110) nor in this Act contained shall extend to revive or restore any judgment which shall be extinguished or barred, nor shall the same extend to affect or prejudice any judgment as between the parties thereto or their representatives, or those deriving as volunteers under them. Applying these words to the case before us, nothing in the 1 & 2 Vict. c. 110 nor in the 2 Vict. c. 11 is to affect the judgment which D. Taylor had obtained against Lord Oxford; and therefore, though we decided and decided correctly upon the question of registration, we think that we are also clearly right in saying that, independently of the question of registration, D. Taylor has a right prior to the voluntary settlement made by Lord Oxford. This disposes of so much of the petition as relates to the question of the payment to D. Taylor, whose claim here is not against the other judgment creditors, but only against the estate of Lord Oxford.

Mr. Bacon then replied on behalf of Lady Oxford, citing *Barton*

v. *Vanheythuysen*, (a) *Brace v. Duchess of Marlborough*, (b) *Smith v. Garland*, (c) *Whitworth v. Gaugain*. (d)

Mr. Walker addressed a few remarks on the case of *Brace v. Duchess of Marlborough*. (b)

January 29.

THE LORD CHANCELLOR. — The question which was re-
 * 515 served for consideration in * this case relates to the priority of three judgment creditors of the late Lord Oxford, namely D. Anderson, T. Brockell, and C. Layton (the claim of G. K. Corfield having been bought up by Lady Oxford's trustees); and the point is, whether by virtue of the Statute of Elizabeth alone, or by virtue of it combined with the statutes of the present Queen, these judgment creditors have or have not a right against the parties claiming under a voluntary settlement executed by Lord Oxford in the year 1838.

The facts are these. In the year 1836, before the passing of the Act 1 & 2 Vict. c. 110, D. Taylor, not one of the creditors whose claims are now under discussion, had recovered a judgment against Lord Oxford, and that judgment being duly docketed was according to law a good lien on Lord Oxford's estate. After that judgment was docketed, and before the passing of the Act 1 & 2 Vict. c. 110, the voluntary settlement in question was made, and under it Lady Oxford is now tenant for life. Subsequently to this the present claimants recovered judgments against Lord Oxford, as to which I need only say that they were duly registered in pursuance of the statutes of the present Queen; and the question is, whether the creditors in respect of those judgments have a claim on Lady Oxford's interest under the voluntary settlement. That depends on the construction to be put on the Act 27 Eliz. c. 4, to the language of which I will now shortly advert.

The Act in question begins by reciting that divers of her Majesty's subjects, after conveyances obtained and purchases made of lands for money or other good considerations, "may have, incur, and receive great loss and prejudice by reason of fraudulent and covinous conveyances, estates, gifts, grants, charges, and

(a) 11 Hare, 126.

(c) 2 Mer. 123.

(b) 2 P. W. 491.

(d) 3 Hare, 416; 1 Phil. 728.

limitations of uses * heretofore made or hereafter to be * 516
made of, in, or out of lands, tenements, or hereditaments so
purchased or to be purchased ;” and then for remedy of these
inconveniences and for the avoiding of such fraudulent, feigned,
and covinous conveyances, gifts, grants, charges, uses, and estates,
and for the maintenance of upright and just dealing in the purchas-
ing of lands, tenements, and hereditaments, it ordains and enacts
“that all and every conveyance, grant, charge, lease, estate,
incumbrance, and limitation of use and uses of, in, or out of any
lands, tenements, or other hereditaments whatsoever, had or made
any time heretofore sithence the beginning of the Queen’s Maj-
esty’s reign, that now is or at any time hereafter to be had or
made for the intent and of purpose to defraud and deceive such
person or persons, bodies politic or corporate, as have purchased
or shall afterwards purchase in fee-simple, fee-tail for life, lives, or
years the same lands, tenements, and hereditaments or any part
or parcel thereof, so formerly conveyed, granted, leased, charged,
incumbered, or limited in use or to defraud and deceive such as
have or shall purchase any rent, profit, or commodity in or out of
the same or any part thereof, shall be deemed and taken only as
against that person and persons, bodies politic and corporate, his
and their heirs, successors, executors, administrators, and assigns,
and against all and every other person and persons lawfully having or
claiming by, from, or under them or any of them which have pur-
chased or shall hereafter so purchase for money or other good consid-
eration the same lands, tenements, or hereditaments or any part or
parcel thereof, or any rent, profit, or commodity in or out of the same
to be utterly void, frustrate, and of none effect.” And then there is
another (the fifth) section framed not quite in the same words, to
which, as reference has been made to it, I will advert : it is to this
effect, — that if any person or persons shall hereafter make
any conveyance of land with any clause or conditions * of * 517
revocation at his will or pleasure and after such conveyance
shall “ bargain, sell, demise, grant, convey, or charge ” (the word
“ charge ” is found in this 5th section, but is left out in the 1st
and 2d sections) “ the same lands, tenements, or hereditaments,
or any part or parcel thereof, to any person or persons, bodies
politic and corporate,” for money or other good consideration
paid or given, the said first conveyance not by him revoked and
made void or altered according to the power and authority reserved

or expressed, then the said former conveyance as touching the said lands, tenements, and hereditaments so after bargained, sold, conveyed, demised, or charged against the said bargainees, vendees, lessees, grantees, and every of them, and against all and every person who shall or may lawfully claim any thing by, from, or under them or any of them, shall be deemed to be absolutely void.

The judgment creditors whose rights are now in question say that under the provisions of the Act just stated they have a title against those who claim under the voluntary settlement; but having considered the subject very attentively I have come to the clear conclusion that they have no such right. The question is, whether they are purchasers within the meaning of the Statute of Elizabeth; in other words, is a judgment creditor a person who in the language of the Act has purchased any part of the lands comprised in the settlement or "some rent, profit, or commodity in or out of the same"? Independently of any authority, I confess I should have thought the proposition hardly arguable that a person who recovers a judgment is a purchaser. A purchaser, in the sense in which the word is used in the statute, is one who gives money or other valuable consideration in order to have the land.

The person who recovers a judgment may indeed eventually
 * 518 get the land, because * under the Statute of Westminster he may take the land in execution, and therefore he is said to have even independently of the last statute a lien on the land, but it is not by any purchase, but by virtue of the right which the law gives him. That that has been so considered for a very long time, is obvious from one or two cases which were referred to or at least mentioned in the argument.

The first case I will allude to, and which lays down the law very clearly and distinctly, and from which there has not been any departure, is *Brace v. Duchess of Marlborough* (a) decided in 1728: the question there was as to the right of judgment creditors to tack their judgment to a mortgage, and whether that could or could not be done. The details of the case are not material to be mentioned: I merely refer to it in order to advert to the language of the Master of the Rolls. After holding first "that if a third mortgagee buys in the first mortgage, though it be *pendente lite*

(a) 2 P. W. 491.

pending a bill brought by the second mortgagee to redeem the first, yet the third mortgagee having obtained the first mortgage and got the law on his side and equal equity he shall thereby squeeze out the second mortgage." He holds "secondly, if a judgment creditor or creditor by statute or recognizance buys in the first mortgage he shall not tack or unite this to his judgment, &c., and thereby gain a preference, for one cannot call a judgment, &c., creditor a purchaser, nor has such creditor any right to the land; he has neither *jus in re* nor *ad rem*, and therefore, though he releases all his right to the land, he may extend it afterwards." This is quite inconsistent with the notion of a person having purchased the land, because if a purchaser releases the land all his estate is gone, but the right of the judgment creditor remains the same though

* he releases the land. The view thus taken is evidently * 519 quite approved and followed by Lord ELDON in the case of *Ex parte Knott*. (a) The facts of that case I need not go into, but I will refer to what Lord ELDON says at p. 617. He says: "I have not altered my opinion upon looking into the case of *Brace v. The Duchess of Marlborough*, which goes upon this, that a mere judgment creditor though he deals originally for a lien does not get an estate originally in the land; he has neither *jus in re* nor *jus ad rem*. But if there is once a creditor by mortgage, and he afterwards advances money upon a judgment, the Court will intend that he makes that advance meaning to take a security upon the land for both, and he may tack; but if he remains a mere judgment creditor the Court says he does not deal upon the faith of the land in this sense, that he does not contract for an interest in the land, and therefore is entitled only as a judgment creditor to an *elegit*, and he cannot tack." Such, then, was the view taken above a century ago and confirmed by Lord ELDON in his observations in the case last mentioned.

So far as I know, this view was never questioned until very recently, except indeed in the two old cases that were referred to by *Mr. Walker*. As to the one from Sir J. Bridgman's Reports (*Garth v. Ersfeild*), it would no doubt be strongly confirmatory of his argument if it were law, although I must observe that it is not the same case as that now before us. It was a case on the fifth section of the Act, and the Court proceeded expressly on the

(a) 11 Ves. 609.

words of that section in holding that a recognizance which was the matter in question was a charge within the meaning of that section. A recognizance is not mentioned in the fifth * 520 section, and I should doubt whether * it did come within the notion of a charge ; but besides this there may be a difference between a recognizance and a judgment, a judgment being in theory at least always an adverse proceeding, whereas a recognizance is not so. There may be such a distinction, though I am bound to say that I do not at all feel confident that the case in *Bridgman* would be so decided at the present day. The other authority cited, an old case in the 2d volume of Reports in Chancery (*Girling v. Lowther*), is exceedingly loosely reported, and if it means that which *Mr. Walker* contends it means, as very likely it does, all I can say is that it is inconsistent with what has been taken to be the state of the law in the subsequent cases. It is, however, difficult, not to say impossible, to discover from the report whether the decision proceeded on the 27 Eliz. or the 13 Eliz., though I rather think it was on the former, and if it was the remark I have just made applies. We were also referred to some observations made by the Vice-Chancellor Sir W. PAGE WOOD in a case — *Barton v. Vanheythuysen* (a) — before him which was undoubtedly one within the 27th Eliz. There was, however, no such question there as there is here. Both the cases on which I have been commenting were, I suppose, referred to, and his Honor speaks of them as being cases undoubtedly under the Statute 27 Eliz. and not under the 13th Eliz. It is with great hesitation that one differs even from the dictum of that learned Judge, but I do not think that he meant to decide any thing on the point: it was not a matter which could have been argued before him: the question in the case was not whether a judgment creditor came within the description of a purchaser, but another question altogether. The conclusion is thus irresistible that under the Statute of Elizabeth, and independently of the statute of the present * 521 Queen, these * judgment creditors have no right as purchasers: they are not purchasers within the meaning of the Statute of Elizabeth, and can therefore have no right against the voluntary settlement.

Then comes a question as to the determination of which my

(a) 11 Hare, 126.

opinion has fluctuated a good deal, namely, whether the case is altered by the statute of the present Queen (1 & 2 Vict. c. 110), but I have come eventually to the conclusion that it is not. The thirteenth section of that statute enacts that a judgment already entered up or to be hereafter entered up shall operate as a charge upon all lands and hereditaments of or to which such person shall at the time of entering up the judgment or at any time afterwards be seised, possessed, or entitled for any estate or interest whatever at law or in equity, whether in possession, reversion, remainder, or expectancy or over which such person shall at the time of entering up such judgment or at any time afterwards have any disposing power which he might without the assent of any other person exercise for his own benefit, and that every judgment creditor shall have such and the same remedies in a Court of Equity against the hereditaments so charged by virtue of this Act or any part thereof as he would be entitled to in case the person against whom such judgment shall have been so entered up had power to charge the same hereditaments and had by writing under his hand agreed to charge the same.

Now what did the legislature mean to do by that enactment? In the first place they meant to make the judgment directly operate as a charge; but a charge on what? I apprehend that there was no principle inducing them to mean, and that the words do not represent them as having meant, to give the judgment creditor any right except against his debtor, that is, the judgment was to * have the effect of a charge on that which was the * 522 property of the debtor. That, I think, is manifest from the words used: the judgment is to operate on land of which the debtor is seised, or over which he "shall at the time of entering up such judgment or at any time afterwards have any disposing power which he might, without the assent of any other person, exercise for his own benefit." That gives no right against a person claiming under a voluntary settlement, for the voluntary settlor, the debtor, could not for his own benefit either with or without, certainly not without, the assent of any other person, defeat his own settlement. It therefore appears to me clear that the statute does not apply to the present case. It was, however, argued that the subsequent words had a further effect, but I think not. These words are "that every judgment creditor shall have such and the same remedies in a Court of Equity against the hereditaments so

charged" (that is, against the hereditaments which are by virtue of the judgment subject to the charge, the hereditaments which the debtor might have made available for his own purposes and might have disposed of without the consent of any other person for his own benefit) "as he would be entitled to in case the person against whom such judgment shall have been so entered up had power to charge the same hereditaments and had by writing under his hand agreed to charge the same." The result of the whole provision is, that the judgment creditor is not to be put to the same inconvenient and circuitous mode of making his judgment available to which he was driven prior to the passing of the statute, he is to be in the same position as if his debtor in respect of any property over which he had an absolute power of disposition had executed a charge in his favour and so given him an equitable right. That, however, does not apply to the present case, because

the power referred to as an additional security to the judgment creditor relates only to *land over which the debtor had an absolute power of disposition as he might think fit.

It is then said that if the debtor had executed a charge in favour of the judgment creditors they would have been purchasers under the Statute of Elizabeth. It is possible that it might be so, but we are now considering the effect of the Statute of Victoria, and that statute does not say that judgment creditors are to be in the same position as they would have been in if there had been a charge made for valuable consideration. What it says in effect is that they have the same rights as they would have had if the debtor had by writing under his hand agreed to charge the property. The words are "agreed to charge the same," and coupling them with the prior part of the section they refer to land of which the debtor had an absolute power of disposing for his own benefit as he might think fit without the consent of any other person.

The only other question is as to the subsequent statute, 2 Vict. c. 11. By that statute the docket roll is finally closed for ever, and all judgment creditors (this would include the case of Mr. Taylor), although docketed and having a valid lien before the passing of the Act, are required not to docket *de novo*, but to register and keep registered from time to time, or otherwise their judgments are rendered unavailable against subsequent purchasers, mortgagees, incumbrancers, or creditors. The question then arises how far this affects the creditors in the present case; I think it does

not affect them at all. There might be a question how far it affected the right of Mr. Taylor, were it not that as between Mr. Taylor and Lady Oxford no question at all can arise either under that statute or under the other statute, because, as between him and Lady Oxford, he had under the old law at the time of the making of the voluntary settlement * a valid lien on the * 524 property. He therefore is unaffected by the Act, and the other creditors cannot get any relief under it. As to these creditors the result is, that they are not purchasers under the Statute of Elizabeth, they are not assisted by the Statute 1 & 2 Vict. c. 110, and I see nothing in the subsequent statute that gives them any right whatever.

There remains only for me to notice a case of very great importance to which our attention was called, I mean that of *Watts v. Porter (a)* in the Court of Queen's Bench, in which with reference not to the 13th section of the Act 1 & 2 Vict. c. 110, to which our attention has been directed, but to a subsequent section, the 14th, the majority of the Court came to a conclusion with which our judgment in the present case may clash, or at least may seem to do so. If it does clash, I very much regret it, but less than I should otherwise do seeing that the judgment of the Court was not unanimous. I must, however, observe that the words of the two sections are not the same, nor are the questions raised precisely the same. The 14th section was framed with the object of giving to judgment creditors a right which they had not had before, a right upon a species of property which was of a nature not capable of being affected by a judgment,—money in the public funds for instance. The section enacts that if any person against whom judgment shall be entered up shall have any government stock, funds, &c., it shall be lawful for a Judge of one of the superior Courts on the application of any judgment creditor to order that such stock, funds, &c., shall stand charged with the payment of the amount for which judgment shall have been so recovered, and interest thereon, and such order shall entitle the judgment creditor to all such * remedies as he would have been enti- * 525 tled to if such charge had been made in his favour by the judgment debtor. The argument in the Court of Queen's Bench arose thus: a judgment debtor was entitled to a sum of money

(a) 3 E. & B. 743.

standing in the name of trustees, and that fund being mortgaged to a large extent, but not exhausting the whole, and the mortgagee not having given notice to the trustees, a judgment creditor obtained a charging order; and the statute saying that such an order should have the same effect as if the judgment debtor had charged, the Court of Queen's Bench held that if the judgment debtor had charged the stock in favour of the judgment creditor, and the judgment creditor had given notice to the trustees, as he did, before notice was given by the first mortgagee, he would have precedence. No doubt, if that were an actual charge, it would have been so; because, in order to complete the title of the mortgagee to such property, it is not only necessary that the mortgagor should have been bound as between him and the mortgagee, but the trustees must also have been bound; and if notice is not given to the trustees by the first mortgagee, a second mortgagee coming in and giving notice will have precedence. The case with which the Court of Queen's Bench had to deal being as I have stated, they held that the judgment creditor under the order was precisely in the same position as the second mortgagee: they held that, the statute having given the remedy against a new species of property, he was to be considered just in the same position as if an actual assignment had been executed by the debtor, and he had first given notice. I confess it seems to me open to argument whether the view of the case taken by Mr. Justice ERLE, who differed from the rest of the Court, was not the right one; namely, that the statute meant nothing more than that the interest of the judgment debtor should be liable to be affected, and had no reference

* 526 to * what might be the equitable consequences of notice or want of notice. At the same time I do not mean to say that the decision which was come to was not correct, unless indeed it clashes with our present decision, in which case I should be bound to say that I think it was wrong. I do not, however, say that it does clash; and we thus think that *quâcunque viâ* it ought not to influence our determination of the case before us.

Mr. Walker. — I do not know whether your Lordship thinks it right to say any thing on the Act, 13 Eliz. c. 5.

THE LORD CHANCELLOR. — We do not think that there are facts to warrant the application of that statute. We have looked through

the case attentively, but we cannot find any thing on the record enabling us to say that it is brought within the Act.

THE LORD JUSTICE KNIGHT BRUCE. — This case, as it now stands before the Court, is not affected by the Statute 13 Eliz. ; but an application was made at the bar on behalf of one or more of the judgment creditors, that an opportunity should be afforded of alleging and proving (if not under the present record at least in some other suit) that the circumstances, intention, and effect of the settlement or deed, under which Lady Oxford and her trustees claim, were such as to invalidate or impeach it by reason of that statute. To me, however, it did not nor does appear to be required by justice or convenience that we should give occasion for any further expense, delay, or litigation, with reference to the title of Lady Oxford and her trustees, or the settlement or deed which created it. And with regard to the Statute 27 Elizabeth, I am also of opinion that, though the judgment creditors are creditors for value, none of them * can be considered as a purchaser, * 527 or mortgagee, or incumbrancer within its words or meaning. It seems to me, therefore, that, independently of the enactments of the present reign, which were mentioned during the argument, Lady Oxford and her trustees, being prior in time, are superior in rank and order, as incumbrancers, to the judgment creditors, other than Mr. Taylor.

Do, then, those enactments make any difference in this respect? According to their true construction, I think not. It appears to me that, in this litigation and for its purposes, the rights of Lady Oxford and her trustees are the same against the judgment creditors, as if the statutes of the present Queen had not passed, my opinion being that a voluntary conveyance, according to the law, as it stood at the commencement of the present reign, was entitled to preference over a judgment, obtained subsequently to the conveyance against the maker of it, — and is entitled to that preference according to the law as it has ever since been and now is.

But, it having been decided that Mr. Taylor (though standing, in point of time and right, before Lady Oxford and her trustees) stands by virtue of these enactments below the other judgment creditors, though those creditors in point of time and right stand below Lady Oxford and her trustees, Lady Oxford and her trustees have claimed to be consequently entitled to take from Taylor the

benefit to which he is as between himself and Lady Oxford and her trustees entitled. This, however, I continue to think cannot be. I am still of opinion that Mr. Taylor has a right to retain for himself whatever he has against Lady Oxford and her trustees a right to claim, and that therefore (as the Lord Chancellor has said) in effect he stands practically first on the list of incumbrancers.

* 528 * THE LORD JUSTICE TURNER. — The first point in this case is whether a judgment creditor is a purchaser within the Statute 27 Eliz. so as to avoid a voluntary settlement. The argument upon that point rested on two early cases. One is the case in the Chancery Reports. Upon examining it I think it is impossible to say whether it proceeds on the 13 Eliz. or on the 27 Eliz. And as to the other case there seems to have been a misapprehension in ascribing the decision in it to the 2d section of the 27 Eliz., for upon examining the case it will be found to have depended on the 5th section and not on the 2d section of the 27 Eliz. The distinction between those two sections is marked and important, for under the 2d section the statute avoids voluntary conveyances made with intent to defraud or deceive purchasers, whereas the 5th section provides that if there be a voluntary settlement made with a power of revocation, and a charge be afterwards created, the creation of that charge shall avoid the voluntary settlement, as if the power of revocation, which is contained in the voluntary settlement, had been actually exercised. In the case in question, there was a power of revocation reserved; and there was, as it was considered by the Court, a charge created; and what the Court held was, that the creation of the charge, falling within the words of the statute, of itself operated as an exercise of the power of revocation, and therefore destroyed the voluntary settlement. That case therefore does not apply. In addition to the authorities which have been referred to by the Lord Chancellor there is the case of *Whitworth v. Gaugain*, (a) before Lord LYNTHURST. It was attempted to distinguish the case of *Brace v. The Duchess of Marlborough* (b) from the present upon this * ground, — that the question which arose in it was with regard to parties in the situation of purchasers for value. That case, however, was decided

(a) 1 Phil. 728.

(b) 2 P. Wms. 491.

not upon any ground having reference to the position attributable to the opposing party, but on that of the character which was filled by the judgment creditor. The ground of decision was that the judgment creditor did not fill the character of purchaser. I think therefore that it stands clear upon authority that the judgment creditor is not a purchaser within the meaning of the Statute of Elizabeth.

But those who here claim against the voluntary settlement have rested their case also on the Statute 1 & 2 Vict. c. 110, and contended that if the judgment had, previously to the passing of that Act, a right to defeat a voluntary settlement that right is a "disposing power" within the meaning of the Statute 1 & 2 Vict. c. 110, by which (section 11) it is enacted "that a judgment entered up shall operate as a charge upon all lands of which the person shall at the time of entering up the judgment be seised, possessed, or entitled for any estate or interest whatever at law or in equity, or over which such person shall at the time of entering up such judgment or at any time afterwards have any disposing power which he might without the consent of any other person exercise for his own benefit." I think, however, that the words "disposing power" must be construed according to their ordinary interpretation. This is the general rule of construction. And here the context proves that it was so intended because the statute distinguishes between powers of different descriptions as between a power which a person may have and exercise for his own benefit and one which he cannot exercise without the assent of other persons. Now a conveyance which defeats a voluntary settlement under the Statute of Elizabeth does * not operate by * 530 way of execution of any power. It operates as a conveyance of the estate which the settlor had before the voluntary settlement. It is the statute and not the act of the settlor that avoids the voluntary settlement, so that the conveyance which is made for value operates on the estate which the party who made the voluntary settlement had before that settlement was made; and the statute puts the settlement out of the way, so that it shall not affect the conveyance which is made to the purchaser.

The point, however, which was most strongly argued in this case was that the Statute 1 & 2 Vict. c. 110, § 13, has made the judgment creditor an equitable mortgagee, and that the voluntary settlement would be void against the equitable mortgage created by

the statute. But the question is, of what does the judgment creditor become the equitable mortgagee under that section. It divides itself into three parts: first, it says that the judgment shall operate as a charge upon the property specified in the Act; next, that it shall be binding on the person against whom it is entered up and against all persons claiming under him, and also shall be binding against the issue of his body, and all other persons whom he might, without the assent of any other person, cut off and debar from any remainder, reversion, or other interest in or out of any of "the said lands, tenements, rectories, advowsons, tithes, rents, and hereditaments;" and, lastly, that every judgment creditor shall have the same remedies in a Court of Equity as he would be entitled to in case the person against whom the judgment was entered up had power to charge the same hereditaments, and had by writing under his hand agreed to charge the same.

First, let us see then what the judgment is to be a
 * 531 * charge upon. By the statute, it is to be a charge upon the lands and hereditaments of or to which the judgment debtor shall at the time of entering up the judgment, or at any time afterwards be seised, possessed, or entitled, or over which he has such a disposing power as is mentioned in the Act. Enough has been already said upon the right to defeat a voluntary settlement not being a disposing power within the meaning of the Act. We have to consider therefore only what are the lands and hereditaments of which the judgment debtor can be said to be seised or possessed of or entitled to. Now, of course, it could not be intended that, if there was a tenant for life of lands, the judgment against the tenant for life should bind the fee of those lands; and, therefore, this part of the section can operate only to charge the interest of the debtor; but then recourse is had to the second branch of the section, as to the persons who are to be bound, and it is said that the judgment is made binding not only against the interest of the debtor, but against all the persons whom the debtor could debar. The question then is, whether that provision applies to the case of a person who is interested under a voluntary settlement, and whose interest might be defeated by the act of the settlor in making a conveyance, supposing the settlor to be the judgment debtor. I think that it does not, and for this reason. Suppose the debtor to have made a voluntary settlement of the entire fee, how could the judgment affect the lands? How could

the judgment debtor be said to be seised or possessed of or entitled to the lands which he had alienated? He could not surely be said to be so seised, possessed, or entitled merely by virtue of the right to defeat the voluntary settlement. In the case, therefore, of a voluntary settlement of the entire fee the judgment creditor could not prevail, and if he could not prevail in that case, neither can he prevail in the case of a voluntary settlement of a particular interest. * With respect to the remedy given, of * 532 course, if there be no right, there is no remedy. Those provisions which go to the remedy extend only to the case in which the right has been given. I think, therefore, the judgment creditor has not a valid equitable mortgage as against the voluntary settlement.

The view which I have taken of the case is not only, I think, patent upon the construction of the statute, but is supported by what Lord LYNDHURST said in the case of *Whitworth v. Gaugain*, (a) in which he laid it down that it was the interest of the debtor only which would be affected by the operation of the statute. On this part of the case we were very much and very ably pressed with the case of *Watts v. Porter*. (b) If it be necessary to give any opinion upon that case, I confess that on examining it I find it difficult to distinguish that case from the present satisfactorily. There are distinctions between them, but upon the broad principle perhaps it is difficult to distinguish them. On looking at the judgments, I prefer the opinion of Mr. Justice ERLE to that of the other three Judges upon this point, and for this reason. What the majority of the Court in that case seem to have proceeded upon was this, that the 14th section charged the stock held in trust for the debtor, and that until notice of the assignment had been given by the mortgagee the stock remained in trust for the debtor, there being no privity between the mortgagee and the trustee until the notice was given; so that the decision of the majority of the Court rested on the ground, as it appears to me at least, that there was a want of privity which prevented there being any trust in favour of the mortgagee until the mortgagee had given notice to the trustee. But with great deference to that * opinion, I apprehend that the equitable * 533 interest which was vested in the judgment debtor passed

(a) 1 Phil. 728.

(b) 3 El. & Bl. 743.

from him by the assignment to the mortgagee, and that after the mortgagee took that equitable interest, the trustee ceased to be a trustee for the judgment debtor, although it might well be that the mortgagee could not charge the trustee for breach of trust until he had given notice of the mortgage. If then the trustee had ceased by the assignment to the mortgagee to be a trustee for the judgment debtor, to that extent the 14th section of the statute had no application, because the 14th section of the statute merely applies to stock standing in the name of the judgment debtor, or of some person or persons in trust for the judgment debtor. It seems to me, with great deference to the opinion of the Court of Queen's Bench in that case, that sufficient attention was not paid to the distinction between the existence of the trusts and the remedy against the trustee.

The only remaining point upon this part of the case was the point which was attempted to be raised on the 13 Eliz., which *Mr. Walker* referred to ; but I cannot say that I think that point open upon the record ; and if it were, I think there is not sufficient certainty upon the evidence to enable us to deal with it here. The case is not one in which there is any ground for granting indulgence to the judgment creditors in the present stage of the case.

Another point was raised of considerable importance, and which was argued with great ability upon the right to 1000*l.* which *Mr. Taylor* has in priority to the voluntary settlement. *Mr. Taylor's* judgment having been registered subsequently to the judgments of *Mr. Anderson* and *Mr. Layton*, it was said that *Mr. Taylor* could take no part of the 1000*l.*, except subject to the

* 534 * claims of *Mr. Anderson* and *Mr. Layton*. This argument rested upon the 2 & 3 Vict. c. 11, which, it was contended, destroyed the effect of *Mr. Taylor's* judgment. But the object of that statute was to close the docket roll under which former judgments were docketed, and to complete a perfectly new register, so that the purchaser should have reference only to one register. For this reason the statute has said that no judgment shall operate unless and until registered ; but when it is registered, there is nothing that I can find in the statute which disturbs the right of the judgment creditor. The consequence is, that the original right in respect of docketing of the judgment is preserved, and is not affected, at least by the Statute 2 & 3 Vict. c. 11.

Eland v. Eland (a) was referred to upon the point; but it does not apply. It was a case between legatees and creditors, where a mortgagee having taken, subject to the satisfaction of certain charges, the question arose whether the legatees were to take the amount of the charges, thus reserved from the mortgagee, or whether the creditors had a prior right upon that amount; and the Court held that the reserved amount was to be treated as general assets, subject first to the claim of the creditors before the legatees could come in. I think that authority not applicable, because in that case there was no prior right in the legatees over the creditors. Here there is a prior right in Mr. Taylor as against the other judgment creditors.

Upon the whole, therefore, my opinion is that the order upon this petition must be made giving the 1000*l.* to Mr. Taylor, and giving the remainder of the fund to the parties claiming under the voluntary settlement.

* ROBINSON v. WHEELWRIGHT.

* 535

1856. January 28, 29. March 18. Before the Lord Chancellor Lord CRANWORTH and the LORDS JUSTICES.

A testator gave a legacy to a married woman upon condition that she conveyed within twelve months an estate devised to her by another testator for her separate use with a clause against anticipation: *Held*, that the Court had no power to interfere for the purpose of enabling the married woman to comply with the condition, though to have done so would have been greatly for her benefit.¹

The decision in *Wall v. Wall*, 15 Sim. 513, observed upon.

THIS was an appeal from a decision of the Master of the Rolls. The object of the suit was to obtain the payment of a legacy of 1300*l.* given by the will of John Wheelwright to his daughter the plaintiff Ann Hoyle Robinson: the following were the facts of the case.

Michael Hoyle, the uncle of A. H. Robinson, by his will dated the 2d January, 1837, devised to his wife and J. Ridehalgh and

(a) 1 Beav. 235; 4 Myl. & Cr. 420, S. C.

¹ See Lewin Trusts (5th Eng. ed.), 555.

H. Wheelwright, whom he appointed trustees and executors, and their heirs, his mansion-house called Grove, and the lands thereto belonging, including the Laithfield, theretofore belonging to the Turna Top farm, and a plot or allotment of land situate near Turna Top, and lately enclosed from the common of Rishworth, and both occupied with the messuage called Grove, upon trust to pay the rents to A. H. Robinson for her separate use, and so that she might not be able in any manner to assign over, charge, or anticipate the same, and after her decease in trust for her children as she should by will appoint, and in default in trust for her first and other sons successively in tail, and in default to her daughters as tenants in common in tail. By a codicil to his will, dated the 27th February, 1840, M. Hoyle substituted W. Priestley in the place of H. Wheelwright as trustee and executor. M. Hoyle died on the 25th August, 1851.

It appeared that previously to the date of his will, and between the date of the will and the codicil, and also subsequently * 536 to the codicil, M. Hoyle took pieces of land * part of the common of the manor of Rishworth, and that he occupied them with the Grove estate until his death, paying for these encroachments a quit-rent to the lord of the manor.

On the 27th October, 1854, John Wheelwright, the father of A. H. Robinson, made his will containing the bequest upon which the question now to be determined arose; it was in the following terms: "Whereas my daughter Ann Robinson, the wife of John Robinson, having been amply provided for by my late brother Michael Hoyle, I give to her the sum of 1300*l.*, to be paid to her by my executors only upon condition that she or her said husband shall give up, and absolutely convey or cause to be conveyed, all his, her, or their estate and interest in the encroachments made by my said brother upon the common or waste lands in Rishworth aforesaid, adjoining upon the Booth farm and the Turna Top farms in Rishworth aforesaid, and devised by my said brother Michael Hoyle unto my said daughters Elizabeth and Sarah in such shares and proportions as shall be determined by the share to be allotted to Elizabeth to be conveyed to John Dyson and Thomas Dyson upon such and the same trusts as are hereinbefore declared in favour of the said Elizabeth Lockwood and her children, and the share to be allotted to the said Sarah Horner to be conveyed upon the same trusts as are declared under the will of my said

brother with respect to the Booth farm in favour of the said Sarah Horner. And I hereby expressly declare that if the above conditions are not or cannot be complied with within twelve months after my decease, then that such sum of 1300*l.* shall not be paid to my said daughter Ann Robinson."

John Wheelwright died on the 10th January, 1855.

* The present suit was instituted by A. H. Robinson and * 537 her husband John Robinson as plaintiffs against the surviving trustee of the will of M. Hoyle, the executors of J. Wheelwright, and the four children of the plaintiffs who were infants. The bill stated that the plaintiffs were desirous of performing the condition in the will of John Wheelwright so as to entitle themselves to the legacy of 1300*l.*, and that for that purpose they were willing to do any act, or to execute or to cause or procure to be executed any conveyance, surrender, or other instrument that might be necessary or proper; but that the executors alleged that, on account of the interest of the plaintiff A. H. Robinson in the said encroachments being inalienable, the performance of the condition was impossible; and that the said legacy would therefore never become payable. The bill prayed a declaration as to the construction of the will of John Wheelwright, and that on the plaintiffs or their trustee executing such deeds, and doing such acts as the Court might think requisite for the due and full performance of the condition (which they submitted to do), the executors of John Wheelwright might be decreed to pay the 1300*l.*

The bill also contained a statement that the encroachments were of the value of 120*l.* or thereabouts, and that it would be greatly for the benefit of the female plaintiff as well as of the infant defendants that such encroachments should be given up in consideration of the sum of 1300*l.*, which the plaintiff John Robinson submitted to settle as the Court might direct for the benefit of his wife and children.

The cause was heard by the Master of the Rolls on the 18th December, 1855, and on the 20th December, 1855, his Honor decided against the right of the plaintiffs, being of opinion that the Court had no power to * release the separate estate * 538 of A. H. Robinson in the property devised to her by the will of M. Hoyle from the restraint against anticipation thereby attached to it so as enable her to comply with the condition imposed by the will of John Wheelwright for the purpose of enti-

ting her to receive the legacy of 1300*l*. From this decision, a report of which will be found in the 21st volume of Mr. Beavan's Reports, page 216, the plaintiffs appealed.

The case was mentioned to the Lords Justices shortly before the Court rose for the Christmas vacation, and it was suggested that the appeal ought to be immediately heard so as to enable the condition in question to be complied with within the twelve months mentioned in the will. Their Lordships, however, refused to make any special arrangement for hearing the case, but directed that whenever heard the matter should be treated as if heard within twelve months after the testator's death.

The appeal then came on in regular course before the Lords Justices on the 21st January, 1856, but, after the matter had been partially discussed, their Lordships stated that the point involved was one of so much doubt and nicety that it would be well to have it disposed of with the assistance of the Lord Chancellor. The case now came on before the full Court of appeal accordingly.

Mr. R. Palmer, for the plaintiffs, supported the appeal. — The blank which occurs in the will of J. Wheelwright was not treated by the Master of the Rolls as in the least degree affecting the question now to be disposed of, and it may therefore be discussed as if no such blank existed. The Master of the Rolls declined to deal with the case as one of election, but it is submitted that
 * 539 this view of it was *incorrect, and that the principles usually applied to cases of election are applicable here, and if so it is submitted that no impediment would be thrown in the way of the plaintiff's right by the restraint against anticipation. The case may be considered in two points of view, first in reference to the doctrine of election, and secondly in reference to the doctrine of restraint against anticipation.

First, with regard to the doctrine of election, the authorities on which are collected in *Dillon v. Parker*, (a) it proceeds on the ground that a person who claims under a will is entitled to come here to enforce his right, but that he must perform any condition annexed to the gift. When a party is put to elect it assumes a right to take, but it must be according to the terms of the gift and on fulfilling any condition imposed, and this operation of the doc-

(a) 1 Swanst. 359.

trine is not prevented by the situation of the party who is put to elect. *Wilson v. Lord John Townshend*. (a) Thus in every instance of election all necessary conveyances by the parties must be made. Cases of compromise, too, depend on similar principles, and in these the existence of a trust restraining anticipation has never been regarded as an impediment. Suppose, for instance, a gift of 100,000*l.* was directed to be settled on a married woman for her separate use with a clause against anticipation on condition of her assigning a sum of 100*l.* consols vested in trustees on the same trusts, it would surely be very singular to hold that the married woman could not accept this benefit. The restraint against anticipation is a creature of this Court, and the Court must have all powers over it necessary for the purposes of justice. The doctrine has been established subject to all existing doctrines of the Court and that of election * among others, and it is there- * 540 fore to be used not for the detriment of the married woman, but for her advantage. In the case just supposed the direction against alienation is substantially complied with by the 100,000*l.* being given on the same trusts as the 100*l.*, the particular trust being the same in its nature, though differing in its application. In the case of an infant the Court will elect for him ; seeing that the infant would be a loser of one or other of two things, it will do what is necessary for his benefit. *Jacob's Husband and Wife*, page 28, note.

[The Lord Justice TURNER mentioned *Calvert v. Godfrey*. (b)]

Secondly, as to the separate estate of a married woman and the restraint against anticipation. The doctrine has from time to time been expanded, but it has never been the intention of the Court to free it from the ordinary principles on which the Court proceeds, and certainly not in such a way as to injure the party for whose protection it was originally established. Lord Chancellor COTTENHAM in giving judgment in *Tullett v. Armstrong* (c) thus expresses himself: "When once it was established that the separate estate of a married woman was to be so far enjoyed by her as a *feme sole* as to bring with it all the incidents of property, and that she might therefore dispose of it as a *feme sole* might do,

(a) 2 Ves. Jr. 693 ; see the judgment of the Lord Chancellor, pp. 696, 697.

(b) 6 Beav. 97.

(c) 4 Myl. & Cr. 390 ; see p. 393.

it was found that, to secure to her the desired protection against the marital rights, it was necessary to qualify and fetter the gift of the separate estate by prohibiting anticipation. The power to do this was established by authority not now to be questioned, but which could only have been founded upon the power of this Court to model and qualify an interest in property which it had itself created, without regard to those rules which the law has * 541 established for regulating the enjoyment of property * in other cases. If any rule, therefore, were now to be adopted, by which the separate estate should, in any cases, be divested of the protection of the clause against anticipation, it would, in such cases, defeat the object of the power so assumed." The whole doctrine is a rule of an equitable character established for the advancement of a real object, namely, the protection of married women against the marital rights of their husbands, but to use the rule for a collateral purpose would be totally foreign to its object. *Ardesoife v. Bennet* (a) was the case of election by a married woman made out of Court, and it was held binding, and the decision has never been doubted. *Wall v. Wall* (b) is an authority directly in point on the question of principle. [He also referred to *Whittle v. Henning*, (c) and to *Field v. Moore*. (d)]

Mr. Wickens, on the same side. — The question of principle is shortly this, whether the Court is limited in its power to elect for an incapacitated person in consequence of the nature of the interest taken by that person in one of the things to be elected. There are cases where the Court has elected for a person in which the interest given up has been something which could not be dealt with out of Court. *Wall v. Wall*, (b) *Ashburnham v. Ashburnham*, (e) *Stroud v. Norman*. (g)

Mr. Amphlett appeared for the trustee of M. Hoyle's will, and the children of Mr. and Mrs. Robinson. — He submitted * 542 that it was not the intention of the testator * J. Wheelwright to extend the condition so as to affect the infant children. He stated that as far as the children were concerned, it

(a) 2 Dick. 463.

(b) 15 Sim. 513.

(c) 2 Phil. 731.

(d) Since reported 20 Jur. 145.

(e) 13 Jur. 1111.

(g) 1 Kay, 313.

would be for their interest that the legacy should be paid to the plaintiffs as Mr. Robinson had agreed to settle it.

Mr. Follett, for the executors of J. Wheelwright, supported the decision of the Master of the Rolls. — It is submitted that the condition cannot be performed, and therefore that Mrs. Robinson is not entitled to the legacy. The case has been treated as one of election, but there is a clear distinction between cases of pure election, and of election with a condition attached to one of the gifts: in the former the Court may impose some condition either available or not, but in the latter it must expressly carry out what has been prescribed, and if the Court cannot do that, the benefit cannot be taken. *Pulteney v. Lord Darlington*, (a) *Roundel v. Currier*, (b) *Boughton v. Boughton*. (c) Looking, then, at the condition imposed in the present case, it is said that although it cannot be performed out of Court, yet that the Court has some sort of dispensing power which will enable it to make or direct the conveyance which Mrs. Robinson is herself restrained from making. *Tullett v. Armstrong* (d) has been referred to in favour of thus moulding the condition restraining alienation, but nothing there said can warrant what would not be a moulding of the condition but its destruction. The cases of *Wall v. Wall* (e) and *Field v. Moore* (g) do not support the position for which they have been cited, and *Jackson v. Hobhouse* (h) is * directly opposed * 543 to it. It is submitted that the cases referred to, where the Court acted for parties under disability — *Wilson v. Lord John Townshend*, (i) *Ardesoife v. Bennet*, (k) *Ashburnham v. Ashburnham*, (l) — do not establish the plaintiffs' case, — see also *Streatfield v. Streatfield*, (m) — and that there is no weight in the argument likening this case to one of compromise.

Mr. Cairns followed on the same side. — The plaintiffs have to show how the fetter imposed by the will of M. Hoyle on the estate devised to Mrs. Robinson can be got rid of. It is said that the

(a) Fonblanque's Equity, 5th ed. vol. ii. p. 328, note.

(b) 2 Bro. 67.

(c) 2 Ves. 12.

(d) 4 Myl. & Cr. 390.

(e) 15 Sim. 513.

(g) Since reported 20 Jur. 145.

(h) 2 Mer. 483.

(i) 2 Ves. Jr. 693.

(k) 2 Dick. 463.

(l) 13 Jur. 1111.

(m) 1 Swanst. 436, n.

condition is a creature of equity, and that the Court may therefore deal with it, but looking at the history of the doctrine is quite sufficient to destroy any idea of this kind ; it can no more be modelled as to its rules and application than a trust can ; and every settlor and testator has a right to reckon on the rule as established. *Jackson v. Hobhouse.* (a) The legal estate is in the trustee of M. Hoyle's will, and any conveyance by him would be clearly a breach of trust. Suppose, for instance, that J. Wheelwright had during his lifetime made the proposal, could the trustee have come to the Court and asked its aid in accepting it, and there is really no difference between that case and the present. The Court would not direct a breach of trust, nor would it direct the sale of an infant's estate. *Calvert v. Godfrey.* (b) The distinction between pure election and election accompanied by a condition has been already pointed out, — see also *Lady Cavan v. Pulteney,* (c) — and in reference to treating this case as a compromise it is to be remem-

bered that in compromises the Court with full discretion * 544 over the whole subject is * dealing with a matter of decision, not of conveyance. With regard to what the testator M. Hoyle might himself have wished it is useless to speculate. So far as the blank in the will is material, it must be treated just as if there had been a name filled in of some person who died in the lifetime of the testator.

Mr. Wickens replied. — The plaintiffs' case rests on this, that the Court may elect for incapacitated persons. It is no answer to say that the same principle would enable the Court to sell infants' estates and grant building leases. These are things which it has never been laid down that the Court will do, but what is now asked is not new. The argument comes to this, — has the Court jurisdiction to do what the plaintiffs ask ? we say that it has, and that to repudiate it will be going against decided cases and understood principle.

March 18.

The Lord Chancellor stated the facts as above set out, and then proceeded as follows : The question in this case is whether the Court can enable the *feme covert* to aliene her life-interest in spite

(a) 2 Mer. 483.

(b) 6 Beav. 97.

(c) 2 Ves. Jr. 544.

of the restraint on alienation, it being clear that the price she would receive as the consideration for such life-interest very greatly exceeds its value; the Master of the Rolls decided that this could not be done, and I think rightly.

The argument was that restraint on alienation is a *mere creature of equity, and so ought not to be used to * 545 the prejudice of the party whose interests it was intended to protect. This is a fallacy; the restraint is created by the author of the gift, and the question is whether what is proposed is consistent with the terms of his gift. If he had anticipated the facts which have occurred, probably he would have authorized what is now asked, perhaps not, but the question is what he has authorized; he has not authorized, but has expressly forbidden alienation, and if the Court were to authorize alienation, it would be defeating, not effecting, his declared intention. If a testator were to devise a real estate to the use of trustees in fee in trust to pay over the rents to A. B. for life, with remainder to her first and other sons in tail, with no power of sale and exchange, and afterwards a second testator were before A. B. had issue to devise another estate of double the value to the same uses and on the same trusts on condition that the estate first devised should be within a year conveyed to some other uses, this, though obviously beneficial to A. B. and her issue, could not be accomplished; that is precisely this case.

It was endeavoured to liken the case to cases of election where married women have been bound to elect, and we were referred to *Wilson v. Lord John Townshend*. (a) There the testatrix gave to her granddaughter an annuity of 200*l.* per annum for her separate use for life, charged on real estates in part of which the granddaughter had an estate of inheritance in remainder after a prior estate tail in her brother, but of the whole of which estates the testatrix supposed she was seised in fee and which by her will she devised away subject to the 200*l.* per annum; after the * death of the testatrix the granddaughter's brother died * 546 without issue, and she sought by her bill to establish a valid title to the annuity without giving up to the devisees of the testatrix that part of the estate charged with it to which she had succeeded on the death of her brother; Lord LOUGHBOROUGH held that

(a) 2 Ves. Jr. 693.

she could not do this, that though a married woman she was bound to elect between the will under which she claimed the 200*l.* per annum and the settlement under which she set up a title adverse to the right of the testatrix in a portion of the lands charged, and it being clear, or assumed to be clear, that the settled lands were of far greater value than the 200*l.* per annum, the bill seeking payment of the annuity was dismissed. That was strictly a case of election, but it has no analogy to the present; for there the person seeking the double benefit was held bound to give up one of them, it being in her power to give up either. The precedent affords no guide in a case where the difficulty is that the legatee is called on by the terms of the bequest to do what she has no power to do, namely, to alienate property over which she has no power of alienation.

The same observation applies to all the cases of election cited before us, except the case of *Wall v. Wall*. (a) With regard to that case I can only say that I have found it impossible to reconcile the decree with the language of the Vice-Chancellor of England in delivering his judgment, and if it is to be taken as laying down the doctrine that a married woman can by any contrivance part with her reversionary interest in a *chose in action*, it is clearly at variance with the subsequent decision of Lord COTTENHAM

* 547 in *Whittle v. Henning*. (b) There, however, * the inability to alienate arose not from any positive prohibition imposed, as in this case, by the author of the gift, but from a rule of this Court depriving a married woman of all right, even with the concurrence of her husband, to release her interest in reversionary *choses in action*, and refusing to give effect to any assignment or release of such interests. Perhaps his Honor thought, as both the subjects there in question were mere sums of money and as the effect of the decree was to secure for the benefit of the wife and her children against the husband a sum of 18,000*l.* in possession instead of 12,000*l.* in reversion, that to decide otherwise than he did would be to make what is a mere rule of this Court introduced for the protection of the wife against her husband ancillary to injustice. The same observation does not apply to the present case, where the inability to alienate arises from a prohibition lawfully imposed by the original testator, and with which this Court can have no right to interfere.

(a) 15 Sim. 513.

(b) 2 Phil. 731.

The short ground on which my judgment rests is that the legacy of 1300*l.* is given to Mrs. Robinson only in case she should be able and willing within a year to do that which by express prohibition she is restrained from doing, and with which prohibition this Court has no right to interfere.

THE LORD JUSTICE TURNER. — I have but a few words to add. This case, as it appears to me, is in principle governed by *Roundell v. Curren*. (a) It is not, I think, a simple case of election, but a case of election coupled with a condition; and the * question, as I view it, is not whether an election could be * 548 made, but whether the plaintiffs could, within the prescribed period, do the acts which by the will of the testator Wheelwright were required to be done in order to give a title to the legacy. I am of opinion that it was not competent to the plaintiffs to do those acts within the prescribed period, and that this Court had no power to enable them to do such acts, and, therefore, that the legacy fails. What the result would have been if the case had been simply a case of election unaffected by condition, it is unnecessary for us to determine, but as at present advised I am not satisfied that the principle of election might not have been applied, and the rights under it effectually worked out.

The Lord Justice KNIGHT BRUCE concurred.

1856. August 2, 5. Before the Lord Chancellor Lord CRANWORTH and the LORDS JUSTICES.

A testator by his will gave several pecuniary legacies including one to his son E. and devised his freehold, copyhold, and leasehold estates to his sons T. and A. as tenants in common, and he appointed them his residuary legatees and executors. T. died, and by a codicil the testator appointed E. executor in the room of T., and revoked the legacies given to A. and E. by the will, and he appointed them "residuary legatees," and he declared that certain freehold and leasehold property comprised in his marriage settlement, and

(a) 2 Bro. P. C. 67.

which he had power to appoint, should go to the "residuary legatees his sons" A. and E.: *Held*, that the moiety of the real estate devised by the will to T. had lapsed and descended on A. as the testator's heir-at-law, he taking also the other moiety as devisee under the will.¹

Held, also, that in this will the appointment of A. and E. to be "residuary legatees" did not pass to them the testator's real estate.²

THIS was an appeal from a decision of the Master of the Rolls, upon a question of construction arising out of the will and codicil of Thomas Windus, the suit being instituted for the purpose of determining the question.

The testator, having under his marriage settlement power to appoint certain freehold and leasehold estates together with two sums of stock, and being in his own right possessed of freehold, copyhold, and leasehold estates and other personal estate of considerable value, made his will, dated the 21st February, 1837: he thereby gave a legacy of 5000*l.* to each of his five daughters, which legacies he directed to be invested in the names of his sons Thomas Windus and Ansley Windus and his nephew Benjamin Godfrey Windus, and to be paid as in his will mentioned: he also gave to his son Eric Windus the sum of 5500*l.* and to his son Alfred Tubb Windus the sum of 5000*l.* to be vested interests on their attaining the age of twenty-five years, to be invested in the mean time in government or real securities, and the dividends and interest thereof to be applied for their maintenance, education, and

* 550 advancement in life. The testator then directed his * leasehold house and establishment at Stamford Hill, or such other residence as he might have at the time of his decease, to be kept up and maintained for the use and benefit of his unmarried sons and daughters for the space of two years next after his decease, and that for that purpose any sum not exceeding 1000*l.* per annum might be applied by his executors out of his residuary estate; and that 50*l.* per annum should during the same period be applied by his trustees and executors for the clothing and educating of each of his three younger daughters and his two younger sons, to be also paid or provided for out of his residuary personal estate; and as to all his freehold, copyhold, and leasehold messuages, or tenements, hereditaments, and premises, situate in the city of London and county of Middlesex or elsewhere, he did thereby

¹ See 2 Jarman Wills (3d Eng. ed.), 244.

² See 1 Jarman Wills (3d Eng. ed.), 703-714.

give, devise, and bequeath the same with the appurtenances unto and to the use of his said sons Thomas and Ansley, equally between them as tenants in common, their respective heirs, executors, administrators, and assigns, according to the nature and quality thereof; and as to all the rest, residue, and remainder of his personal estate and effects, whatsoever and wheresoever, whereof he might die possessed or entitled to, in possession, reversion, remainder, or expectancy, or otherwise howsoever after payment of the several legacies thereinbefore bequeathed and of such other legacies as he might give by any codicil to his will, he did thereby give and bequeath the same unto his sons Thomas and Ansley, equally to be divided between them share and share alike. The testator then appointed his said two sons Thomas and Ansley, and his said nephew Benjamin Godfrey Windus, executors of his will, and guardians of his sons Eric and Alfred Tubb and his unmarried daughters during their respective minorities, and he enjoined his two elder sons, who from their more mature age he desired to place *in loco parentis* to their younger brothers and sisters, that they would at *all times and on all occasions give them *551 their advice and assistance.

Thomas Windus, the testator's eldest son, died in June, 1838, without issue and intestate.

The testator afterwards made a codicil to his will, dated the 19th August, 1843, in the following terms: "I, Thomas Windus, of Stamford Hill in the county of Middlesex, do declare this to be a codicil to my last will and testament bearing date the 21st February, 1837. Whereas since the making of the said will my son Thomas Windus hath departed this life, in the place and stead of him I do hereby constitute and appoint my son Eric Windus jointly with his brother Ansley Windus, also my daughter Matilda Moore as an executrix in the room of my nephew Benjamin Godfrey Windus, whose former appointment I do hereby revoke, being well convinced from many circumstances that have occurred he would not act. My said two executors and executrix are to act also as trustees, with the same powers and the same indemnity as if originally mentioned both as executors and trustees. I do also revoke the legacies to my aforesaid two sons Ansley and Eric Windus, and do appoint them residuary legatees share and share alike. The property I enjoy and possess under my late dear wife's marriage settlement, and which I have a right to dispose of as I

please to one or more amongst my children, now I do desire that the funded property 1435*l.* 15*s.* 7*d.* 3*l.* per cent consols and 580*l.* 2*s.* 4*d.* 3*l.* 10*s.*, formerly 4*l.*, be appropriated towards the invested bequests in the 3*l.* per cent consols and reduced, which bequests to my son Alfred and my five daughters I wish to be in those funds of the sums mentioned in stock and not in money, and free of all law expenses, commission, or legacy duty, all which expenses

* 552 are to come out of the residue. I do * declare that the freehold in Whitecross Street and the leasehold property in Pentonville, Compton Street, Soho, and elsewhere, agreeable to the said marriage settlement, I mean to go to the residuary legatees my sons Ansley Windus and Eric Windus share and share alike. I do hereby revoke that part of my will ordering the house at Stamford Hill to be continued to be occupied by the family, leaving it to the discretion of my two sons the residuary legatees to act as they please about it." "My son Ansley Windus has my full permission, although an executor, to transact the law business relative to my will and this my codicil, and to be defrayed all law charges and other reasonable expenses. Also my other executor Eric and my daughter Matilda to be entitled to the same expenses incurred."

The testator died on the 13th December, 1854, leaving A. Windus his then eldest son and heir-at-law; and a question arose as to who was entitled to the moiety of the freehold, copyhold, and leasehold hereditaments belonging to the testator in his own right, and which were devised by the will to Thomas Windus.

Ansley Windus, the plaintiff in the present suit, claimed this moiety as heir-at-law of the testator, insisting that it had lapsed by the death of Thomas Windus in the testator's lifetime as above mentioned.

Eric Windus, on the other hand, claimed to be entitled to it under the joint effect of the will and codicil, and as being expressly substituted by the latter instrument in the place of Thomas Windus.

- The cause came on to be heard before the Master of the Rolls in February, 1856, when his Honor decided in favour of the * 553 plaintiff. A very full statement of the * arguments and authorities by which each party supported his contention will be found in the report of the case in the 21st volume of Mr. Beavan's Reports, p. 373. The defendant Eric Windus appealed.

The appeal came on in the first instance before the Lords Jus-

tices, who, after hearing it partially argued, arranged that it should be brought on before the full Court of appeal to be argued by one counsel on each side. It now came on for hearing accordingly.

Mr. R. Palmer (with whom was *Mr. Rogers*) argued the case on behalf of the appellant. — He submitted that the clear intention of the testator was to substitute Eric for Thomas in respect of all the benefits given to the latter by the will. In support of this, he relied on the general scheme of the will, upon the particular wording of the codicil, and especially on the way in which the testator there connected the mention of Eric Windus in his character of residuary legatee with the devise of real estate. He cited the cases of *Day v. Daveron*, (a) *Davenport v. Coltman*, (b) *Evans v. Crosbie*, (c) to show that the expression “residuary legatee” might be read so as to give effect to such an intention of the testator as that now insisted upon [see also *Hope v. Taylor*, (d) *Hardacre v. Nash*; (e)] and mentioned generally *Alleyne v. Alleyne*, (g) *Pitman v. Stevens*, (h) *Den v. Trout*, (i) *Warren v. Newton*, (k) *The Marquis of Titchfield v. Horncastle*, (l) *Underwood v. Wing*. (m)

* *Mr. Swanston* (with whom were *Mr. Lewin* and *Mr. * 554 Foot*) supported the decision of the Master of the Rolls. — He submitted that the heir could only be disinherited by express words or plain intention; that if there was any doubt as to the intention the title of the heir must prevail. He commented on the authorities cited on the other side, referring to the report of *Davenport v. Coltman* as given in 9 M. & W. 481. He cited *Shaw v. Bull*, (n) *Kellett v. Kellett*, (o) *Doe v. Roberts*. (p)

Mr. R. Palmer replied.

(a) 12 Sim. 200.

(b) 12 Sim. 588.

(c) 15 Sim. 600.

(d) 1 Burr. 268.

(e) 5 T. R. 716.

(g) 2 J. & Lat. 544.

(h) 15 East, 505.

(i) 15 East, 394.

(k) Drury, 464.

(l) 2 Jur. 610.

(m) 4 De G., M. & G. 633.

(n) 12 Mod. 592.

(o) 3 Dow, 248.

(p) 7 M. & W. 382.

[The Lord Justice KNIGHT BRUCE referred to the words used by Lord HARDWICKE in the case of *Coryton v. Helyar*, (a) — “There is hardly any case where an implication is of necessity, but it is called ‘necessary’ because the Court finds it so to answer the intention of the devisor.”]

August 5.

THE LORD CHANCELLOR. — This case came on by way of appeal from a decree of the Master of the Rolls, declaring that a moiety of the freehold estates of Thomas Windus, the testator in the cause, descended upon his death to his heir-at-law Ansley Windus, and that a moiety of his copyhold estates descended to his customary heir. The appellant, Eric Windus, complains of that declaration as being unwarranted, and contrary to the true construction of the will.

The testator, describing himself as Thomas Windus, of * 555 Stamford Hill in the county of Middlesex, Esq., fellow * of the Society of Antiquaries, made his will in 1837 [his Lordship here read at length the material passages in the will]; and he appointed his sons Thomas Windus and Ansley Windus together with a nephew Benjamin Godfrey Windus his executors, and the guardians of his daughters. The scheme of the will was therefore this: A gentleman, having four sons and five daughters, provides legacies of 5000*l.* each for each of his daughters, 5500*l.* for his third son, 5000*l.* for his fourth son, and gives the residue of his personal estate to his two elder sons, and devises to them all his freehold, copyhold, and leasehold estates as tenants in common between them. The will was dated in February, 1837, and in the following year the eldest son, Thomas Windus, died without issue and intestate, so that a lapse took place of the devise of one moiety of the real estates and of the bequest of one moiety of the residuary estate. This happened in 1838, but the testator did nothing upon it until the month of August, 1843, previous to which time the third son Eric had attained the age of twenty-five years, which the testator apparently considered to be the proper age of majority. In August, 1843, the testator made the codicil which gives rise to the present question.

(a) 2 Cox, 340; see p. 348.

We must first consider what were the interests of the parties at the time the testator made this codicil, that is to say, what would have been their interests if he had at that moment died without having made any codicil. Had it not been for the statute that altered the old law with reference to the effect of a devise to the heir, and made the heir in such case take as devisee and not as heir, there would have been at that moment of time as to the real estate no disposition whatever. The will had given one moiety of the estates to the eldest son, and the other moiety to the second son, and, the eldest son having died, there was no devise except the devise of the moiety to * the second son, then * 556 become the eldest son, so that it was a devise to the heir, and therefore if the old law had prevailed, the heir always taking by his better title by descent, there would have been an entire intestacy as to the real estate. We need not, however, speculate on this, because by the alteration made in the law the heir would take whatever was given to him as devisee, and not as heir. Therefore in August, 1843, when the testator made his codicil, things stood thus: Ansley Windus, the then eldest son, was devisee of one moiety of the testator's freeholds and copyholds, and legatee, so to call him, of one moiety of his leasehold estates, and the other moiety of the freehold and copyhold estates was undisposed of. That this was so, admits of no doubt; but we must now see what it is that the testator does.

After declaring the instrument to be a codicil to his will, he says: "Whereas since the making of the said will my son Thomas Windus hath departed this life, in the place and stead of him I do hereby constitute and appoint my son Eric Windus jointly with his brother Ansley Windus, also my daughter Matilda Moore as an executrix in the room of my nephew Benjamin Godfrey Windus, whose former appointment I do hereby revoke, being well convinced from many circumstances that have occurred he would not act." One argument which was pressed upon the Court was, that the effect of this was, if not to substitute for all purposes Eric for Thomas, yet to indicate that as being the governing intention in the mind of the testator. I have given attention to that argument, but I think that the words import nothing more than this; namely, that having by the will appointed Thomas and Ansley and his nephew Benjamin Godfrey to be his executors, and Thomas having died and Benjamin God-

frey being unwilling to act, he appoints Eric together with
 * 557 Ansley and instead of his nephew his * daughter Matilda to act as executors. I think that so far as that part of the codicil is concerned this is all which the testator had in view. Then he proceeds, "my said two executors and executrix are to act also as trustees, with the same powers and the same indemnity as if originally mentioned both as executors and trustees." That seems to me to make no difference; there were no trusts except those relating to the several legacies of 5000*l.* each which were given to the daughters; and the testator means to say that these three executors are to act in those trusts just as if they had been named in the will.

We next come to the clause which gives rise to the question,—
 "I do also revoke the legacies to my aforesaid two sons Ansley and Eric Windus, and do appoint them residuary legatees share and share alike;" and the question is, what is the effect of those words? Is the effect of them to substitute Eric and Ansley for Ansley and Thomas in the will as to real and personal estate, or do they leave real estate untouched and unaffected? It is impossible upon such a subject to say that one does not entertain doubt, but the conclusion at which I have arrived is that they affect personal estate only; and I have come to this conclusion upon the grounds which I will now proceed to state.

In the first place, the words "legacy" and "residuary legatee" *primâ facie* have reference to personal estate only. There is indeed no magic in the words themselves, and if they are so used by a testator they may no doubt be construed as referring to real estate. Any man may use his own nomenclature if he only expresses what he means. I have not, however, been able to discover any case which satisfies my mind that independently of con-
 * 558 text you can understand "legacy" or "legatee" or * "residuary legatee" as applying to any thing but personal estate. I think that in that case in the House of Lords, of *Kellett v. Kellett*, (a) we must understand Lord ELDON and Lord REDESDALE to have been of opinion that, if there is nothing to qualify them, the words "legatee" or "residuary legatee" have reference to personal property only. I need not refer to the words used by Lord ELDON (they were very characteristic of his mode of expression) from which I think we may come to the conclusion that

(a) 3 Dow, 248.

that was his opinion, and that the only question he had there was whether there were or were not circumstances that would enable him to put a construction, or rather to say that the testator had put a construction, on those words different from that which they ordinarily import; and he thought there were not.

The general rule therefore I take to be, that if you constitute a person residuary legatee, or if you speak of him in reference to his character of legatee, you refer only to a gift of personalty or are speaking of him only with reference to some gift of personal property. That seems to me to be consistent with all the authorities, at least that I have been able to discover, and I have discovered none in addition to those referred to in the argument. In the case of *Hope v. Taylor* (a) there were gifts to nephews and a brother-in-law of very small sums of money, none being higher than 50*l.* and one being as low as 5*l.*; there was besides a gift to each of these persons and also to one who had no pecuniary legacy at all of some small specific piece of land or a house: the testator then gave twenty-nine acres of land between three of them, saying that it was not to be parted, but that they were to share the rent equally between them; and he then gave to W. Taylor, his sister's son, the house * which raised the * 559 question, together with 10*l.*; he then declared his will and meaning to be, "that if either of the persons before named" (that included the one to whom no money at all was given) "die without issue lawfully begotten, then the said legacy shall be divided equally between them that are left alive:" the question before the Court was whether the devisees of the different houses took estates in tail or estates in fee, and, that being the only question, the Court held that they all took estates tail, inasmuch as the word "legacy" by the context must be construed as referring to the devise of the real estate, because as to one of the persons at least there was nothing else that it could refer to, and as to the others it was impossible to suppose that it was meant to refer to the money gifts so as to keep them liable to such a limitation as that pointed out, taking into account that one of them was only 5*l.*: one of the persons, as I have stated, took nothing but a house, and it being clear that under the words used he was one of "the persons," and every person alluded to being supposed to have

(a) 1 Burr. 268.

taken "a legacy" and he taking nothing but a house, it therefore followed that the house was as to him "a legacy:" that was the reasoning of the Court upon the case.

Then there was the case before Lord KENYON of *Hardacre v. Nash*, (a) where there was a gift to the testator's daughter of 150*l.* when she should come of age, and 150*l.* to the son when he should come of age; all the remainder of his estate and effects of all kinds whatsoever the testator gave to his wife for life, and at her death he directed that the Cockhill estate should fall unto his son Robert for his sole use and benefit and the house at Poplar which

he mentioned should be given unto his daughter Elizabeth * 560 for her own use and benefit, * but in case the son and daughter or either of them should die in the lifetime of the wife, "then those legacies which are here left them shall return unto my wife for her sole use and benefit;" the Court of King's Bench held that the word "legacies" must be taken as applying to the real estate, because there was nothing else to which it could aptly be referred; the legacies of 150*l.* were given to be spent, and it could not be meant that they were to be kept, and the very expression that the legacies should "return" to the wife, though inapt, looked like something that she was previously to enjoy.

There were a great many other cases referred to; but I need hardly go through them *seriatim*. In *Pitman v. Stevens* (b) the testator said, "I give and bequeath all that I shall die possessed of, real and personal, of what nature and kind soever, after my just debts is paid; I do hereby appoint Captain Robert Preston my residuary legatee and executor;" and he desired him to do something handsome for a person whom he named; the Court held (whether the conclusion was quite rational or not I do not stop to inquire, though I believe it was), that the disposition of all the testator's real and personal estate, followed immediately by the appointment of Captain Robert Preston to be his residuary legatee, clearly showed that he meant to say residuary legatee of all my real and personal property. So there are many cases which show that if a testator gives all his property, that passes every thing, real and personal; and the effect of the gift to pass every thing cannot be made less because the person taking is described under the name of "legatee."

(a) 5 T. R. 716.

(b) 15 East, 505.

Then there is a case of *Day v. Daveron* (a) before the late Vice-Chancellor of England, where the testator * made * 561 his wife residuary legatee to "all other property I may possess at my decease." There again the same observation applies. That is a gift of all property which he may possess at his decease; the person named does not the less take it because the testator describes him under the character of residuary legatee.

In *Davenport v. Coltman*, (b) which came as a case from this Court to the Court of Exchequer when I had the honour of a seat there, we thought, rightly or wrongly, that you might reduce the proposition almost to a syllogism; the testator having real estates, one portion of which was a freehold house at Chester, gave that house to his wife during her life, and he desired that at her death his daughters Mary Newbold and Charlotte Coltman should divide "equally between them as residuary legatees whatever I may die possessed of;" did that include real estate? The testator subsequently directed that the house at Chester should not be sold until after his wife's death, but why was it to be sold at all? Evidently because the testator understood that under the prior disposition it would have to be divided so that Charlotte Coltman and Mary Newbold might take each one-half of it, but they only took half if they took under the description of residuary legatees of whatever he might die possessed of; thus it seemed to follow as a necessary and almost a logical conclusion, that he must have understood that that house in Chester, and if the house in Chester then the rest of his real estate, was included in the gift to his daughters by the description of residuary legatees.

Two cases before Lord St. LEONARDS were also cited. In one of them, *Alleyne v. Alleyne*, (c) it is true that Lord St. LEONARDS expressed an opinion that if he had * had to con- * 562 strue the will he should not have held the residuary gift there confined to personal estate. That question, however, was very little discussed, and in truth it did not arise at all, because the decision went upon a point that disposed of the property by deed *inter vivos*, before the will had come into operation. The testator had given all his real and personal property to his son John, "in case he shall recover from his present illness," charged with an annuity to be applied for the maintenance and education

(a) 12 Sim. 200.

(b) 9 M. & W. 481.

(c) 2 J. & Lat. 544.

of his grandson, and the testator intrusted the care of his said grandson unto his daughter Ellen Alleyne, "who I hereby appoint my residuary legatee." I should have had some doubt about that case. What was said was, however, merely a dictum of the learned Judge, or rather a speculation as to what he would have decided if the case had come before him for decision; what was there said amounted to no decision, and I think can hardly be relied upon as such. If it were to be treated as an authority, it still has that ingredient in it that it is a case in which the testator begins by disposing of all his property.

In the second case before Lord ST. LEONARDS, of *Warren v. Newton*, (a) just as in several of the other cases, the testator said, "I leave my brother-in-law Philip Newton residuary legatee to all my property." If he had said, "I give him all my property," that would have carried real estate, and the real estate is not the less given because the person to take is described as "residuary legatee."

I own I have some difficulty in understanding the case of *Evans v. Crosbie* (b) before the late Vice-Chancellor of England, * 563 because that learned Judge seems to me to * have been a little distrustful, as I infer, of his own opinion, for he refers to arguments of which I confess I am unable to see the force. There several legacies were given charged on real estate, the real and personal estate being given to trustees on trust by sale, mortgage, or other disposition to pay the testator's sister 1500*l.*, the interest to be paid to her during her life, and at her decease 1000*l.* of it to go to her daughter and 500*l.* to her son; the testator then gave 1000*l.* to his brother James, and added, "I leave and bequeath unto my brother Donald Currie the sum of 2000*l.* and also to be my residuary legatee;" his Honor seems to have thought that the legacy being to be raised out of the real estate gave a construction to the term "residuary legatee," but I think it very doubtful whether that was a legitimate mode of reasoning; the Vice-Chancellor indeed appears to have thought so too, for he says, "suppose that the word 'legatee' had not been there, and that the testator had said merely 'and also to be my residuary,'" thus using an adjective without a substantive, and he intimates that in this case he would have inferred the testator to have meant "devisee;"

(a) Drury, 464.

(b) 15 Sim. 600.

that may be so, for if he had used no substantive at all, and you had been obliged to put in a substantive for him, you might have found the means of putting in one which would have aptly met the circumstances; but the testator did use a substantive, and this does not, in my view of the authorities, alter the case; his Honor appears further to rely upon the probable insufficiency of the personal estate, but I confess the reasoning does not appear satisfactory to my mind.

Upon these grounds then, and looking at the authorities, I do not find sufficient to justify me in saying that the constitution of the parties in the case before us as residuary legatees does enable me to say that in this codicil the real estate was meant to be included. I am *aware that my learned brother on my *564 right does not take the same view of the case, and perhaps he will say that it is a strong argument in favour of the construction which I do not adopt, that if the testator could be asked, he would say that he would have wished to include his real estate. I do not say that that is the construction in my view of the case of the words which he has used, though, reasoning upon the ordinary motives which influence persons in disposing of their property, I cannot help suspecting that that is what he would have done if he had thought of it. I cannot, however, come to that view on the question of construction.

This has occurred to me: suppose Ansley, the now eldest son, had been by the will the sole devisee, and the testator had said in his codicil, "I revoke the legacies to my aforesaid two sons Ansley and Eric Windus, and do appoint them residuary legatees." Could it possibly be said that in that case the devise to Ansley would have been revoked? If it could not, what difference does it make that he was only co-devisee with another? Reluctantly therefore, for the reasons I have hinted at, but still feeling rather confident that it is warranted by the authorities, I have come to the conclusion that the decision of the Master of the Rolls was correct, and that we have no right to say that the words "residuary legatees" here mean more than that which they ordinarily import, namely, persons who are to take the *corpus* of the personal estate; and I therefore think that the appeal is unfounded.

THE LORD JUSTICE TURNER.—The sole question to be determined on this appeal is whether by the codicil to the testator's will

a moiety of the testator's freehold and copyhold estates is
* 565 well devised * to the appellant Eric Windus. [His Lordship stated the will and proceeded.]

There is therefore a separation of the freehold, copyhold, and leasehold estates from the residue of the personal estate, there being distinct clauses disposing of those several classes of property. After this will was made, Thomas, the eldest son, died without issue and intestate, and the dispositions of the will, therefore, so far as respected a moiety of the freehold and copyhold estates, and a moiety of the residue of the personal estate, fell to the ground.

In that state of circumstances, on the 19th August, 1843, the testator made the codicil upon which the question arises. He first recites the death of his son Thomas, and he then constitutes and appoints his son Eric (who was the third son, and who at that period had attained the age of twenty-five years) in the place and stead of Thomas: "I do hereby constitute and appoint my son Eric Windus jointly with his brother Ansley Windus, also my daughter Matilda Moore as an executrix, in the room of my nephew Benjamin Godfrey Windus, whose former appointment I do hereby revoke, being well convinced from circumstances that have occurred he would not act. My said two executors and executrix are to act also as trustees, with the same powers and same indemnity as if originally mentioned both as executors and trustees. I do also revoke the legacies to my aforesaid two sons, Ansley and Eric Windus, and do appoint them residuary legatees, share and share alike." Then he takes up an entirely new description of property. It appears that, under his marriage settlement, he had a power of appointment over certain real and certain personal estates, and he now proceeds to exercise that power. "The
* 566 property I enjoy and possess under my late dear wife's * marriage settlement, and which I have a right to dispose of as I please, to one or more or amongst my children, now I do desire that the funded property," enumerating it, "be appropriated towards the invested bequests in the 3l. per cent consols and reduced, which bequests to my son Alfred and my five daughters I wish to be in those funds of the sums mentioned in stock, and not in money, and free of all law expenses, commission, or legacy duty, all which expenses are to come out of the residue." By these words he appoints the funded property comprised in the settlement, directing it to be paid in aid of the legacies, which had

been given by the will, and directing those legacies to be paid free of commission and legacy duty, all of which is to be paid out of the residue. Then he goes to the freehold and leasehold estate comprised in the settlement: "I do declare that the freehold in Whitecross Street and the leasehold property in Pentonville, Compton Street, Soho, and elsewhere, agreeable to the said marriage settlement, I mean to go to the residuary legatees, my sons Ansley Windus and Eric Windus, share and share alike." Then, having disposed of the settled property, he proceeds with respect to the Stamford Hill property in these terms: "I do hereby revoke that part of my will ordering the house at Stamford Hill to be continued to be occupied by the family, leaving it to the discretion of my two sons, the residuary legatees, to act as they please about it, hoping with their usual goodness of heart they will act for the comfort of their dear sisters, my beloved daughter and their brother Alfred." Then he mentions that his daughter Laura had married against his wishes, and he revokes the legacy of 5000*l.* which he had given to her, and he gives her a legacy of 2000*l.* only.

Now, it is upon this instrument that the question arises, whether this is or is not a disposition of a moiety * of the * 567 freehold and copyhold estates in favour of the testator's son Eric. The argument, on the part of the appellant, has been this, that this codicil originated in the death of Thomas, and that the scope and object of it was to place the two then eldest sons Ansley and Eric in the position in which Thomas and Ansley had stood under the will. But it is plain that the codicil had further objects, for it not only disposes of the settled property, which was not affected by the will (being subject to a power of appointment), but it alters the arrangements as to the Stamford Hill property, and the legacy to the daughter Laura. Still, however, the object of it might have been to place these two sons Ansley and Eric in the position in which Thomas and Ansley had stood as to all the property comprised in the will, and, no doubt, the circumstances of the case favour the argument that it was for this purpose the codicil was made, for the codicil mentions the death of Thomas, and it was made at no very distant period after Eric had attained twenty-five, the period of majority prescribed by the testator's will. It is probable therefore that it was with this intention the codicil was made; but it is one thing to say that the intention is probable, and another thing to say that it is so certainly expressed that this Court

can give effect to it. The latter position is the one which we have to consider.

The argument on the part of the appellant has rested on two grounds: first, that the introductory clause of the codicil amounts to a complete substitution of Eric for Thomas; and secondly, if not, that it aids the construction of the other dispositions of the codicil, and that under those other dispositions the appellant was intended to take, not only half of the residuary personal estate, but also one-half of the freehold and copyhold estates.

Upon the first of these points I entertain no doubt. I * 568 * think that in this part of the codicil the intention was only to substitute Ansley as executor in the place of Thomas. The provision is connected with the appointment of the daughter Matilda Moore as executrix; and when the testator comes to the appointment of trustees, he refers to what he had done in these terms: "My said two executors and executrix are to act also as trustees, with the same powers, &c.," thus showing his impression that he had by the previous part appointed the son Eric and the daughter Matilda to be executor and executrix. Besides, if this clause was intended to amount to a complete substitution of Eric for Thomas, some at least of the ulterior provisions of the codicil would have been unnecessary, and indeed the codicil would not be throughout consistent.

The question therefore turns upon the second point; and on this point, it does not seem to me that the introductory clause furnishes any aid. It does not, I think, follow that because the testator intended to substitute Eric for Thomas as executor and trustee, he therefore intended to substitute him for Thomas in other respects. This point, therefore, depends on the other dispositions of the codicil. Before proceeding to examine those other dispositions, there are two observations upon the general scheme of the codicil, which seem to me to be of some importance: first, that throughout this codicil, the word "legacy" is not, nor (subject to what I shall presently notice) are the words "residuary legatees," in any manner used with reference to real estate. They had been used in the will in their proper technical sense, and they are so used in this codicil. Such words do not of themselves embrace or extend to real estate, and, so far therefore as the mere context of words is concerned, there is no context to aid the appellant's construction. The testator has not (as in the case

mentioned by the Lord * Chancellor) interpreted his own * 569 language. Secondly, this testator, where he has made a new disposition, has commenced by revoking. He has done so both as to the legacies of Ansley and Eric, and also as to the Stamford Hill property. He has not been content to rely on the mere effect of inconsistent dispositions.

With these observations I proceed to examine the several clauses of this codicil. Upon the first clause I will add only, that, assuming the construction I have put upon it to be correct, it seems to me to furnish some considerable argument against the appellant, for it shows that where the testator intended to substitute, he knew what language to use for that purpose.

We come then to the second clause: "I do also revoke the legacies to my aforesaid two sons Ansley and Eric Windus, and do appoint them residuary legatees, share and share alike." Now what was the effect of this clause of revocation? Did it revoke the devise to Ansley of the moiety of the freehold and copyhold estates? I take it to be clear that it did not; and, if it did not, surely, looking to the scheme of the codicil to which I have adverted, it furnishes a strong inference that the testator did not intend to dispose of the moiety of those estates. Besides, the words are "legacies," "residuary legatees," which, as I have before observed, had been used in the will in their proper sense. I think, therefore, the appellant's argument cannot be maintained on this clause standing alone.

We come then to the third clause, which disposes of the settled property. The argument upon it was this, that it connects the expression "residuary legatees" with real estate. But it is observable, that after having appointed these two sons to be residuary legatees, the * testator never mentions them without * 570 connecting that description with their names, whether he is speaking of real or personal estate; and surely it would be going too far to hold, that because in disposing of some real estate the testator has spoken of these sons in the character which they actually filled of residuary legatees, he therefore intended them to take in that character other real estate to which he had made no reference. There is, besides, an expression in this part of the disposition which seems to me strongly to indicate what the testator understood by "residue." He directs the legacies to be free of

“law expenses, commissions, or legacy duty, all which expenses,” he says, “are to come out of the residue;” and this “residue” must, I think, be the residue of the personal estate, for the legacies are not even charged on the real estate.

There remains then the clause as to the Stamford Hill house. This property is peculiarly circumstanced. It formed part of the leaseholds specifically bequeathed to Thomas and Ansley. By Thomas’s death his moiety fell into the residue, and Ansley, therefore, got three-fourths of it. I observe, however, from the decree, that the Master of the Rolls was of opinion that the specific bequest of the leaseholds was revoked by the codicil. This point is not before us, and I therefore give no final opinion upon it, but I incline to agree with the Master of the Rolls in this respect. I do not, however, think the question material, as in any event the sons would take the leaseholds between them; and, for the reasons which I have given on another part of the case, I think no reliance can be placed upon their being here denominated “residuary legatees.”

But then the appellant argued upon this clause, that if the
 * 571 disposition of the leaseholds was revoked, and the * leaseholds were taken by the sons as residue, the freeholds and copyholds ought to be held to be also taken by them in the same character, all being comprised in the same clause of the will. I cannot, however, agree with that argument. Why may not the testator have intended to revoke and make a new disposition of the leaseholds, without affecting the freeholds and copyholds? The testator may have intended to make a future disposition of the freeholds and copyholds. He may have omitted them by oversight. He may have intended to include them, but if he did so intend, I think he has not sufficiently expressed that intention, and upon the whole, therefore, my opinion is that the decree ought to be upheld, and the appeal dismissed, but I think it is a case in which the costs of the appeal should come out of the estate. I have not noticed the cases referred to in the argument, for every case of this description must depend upon the language of the particular instrument.

THE LORD JUSTICE KNIGHT BRUCE. — The view which I take of this codicil, differing as it does from the united opinions of the Master of the Rolls, the Lord Justice TURNER, and the Lord Chan-

cellor, is most probably erroneous. I acknowledge, however, my impression, my conclusion, to be in favour of the appellant, and against the heir. But the appeal of course stands dismissed. The costs to come out of the estate.

* In the Matter of The ROYAL BANK OF AUSTRALIA, * 572
and of The JOINT-STOCK COMPANIES WINDING-
UP ACTS, 1848 and 1849.

ROBINSON'S EXECUTOR'S CASE.

1856. January 23, 24, 25, 28. June 25, 28. November 24. December 4.
Before the Lord Chancellor Lord CRANWORTH and the LORDS JUSTICES;
and before the Lord Chancellor Lord CRANWORTH and the LORDS JUSTICES,
assisted by Mr. Justice CRESSWELL and Mr. Baron MARTIN.

By the provisions of a deed constituting a joint-stock company it was declared that the proprietor of each share should bring in the sum of 50*l.* in respect of such share as and when called upon so to do in manner thereafter provided, and that each of the proprietors should be entitled to the profits and liable for the losses of the company in proportion to his shares. The executor of a shareholder who had executed the deed of settlement being placed on the list of contributories of the company which was being wound up under the Joint-stock Companies Winding-up Acts: *Held* (the Lords Justices KNIGHT BRUCE and TURNER *dubitantibus*), that a call made by the Master under those Acts was not a specialty debt.

Every shareholder as a partner is liable to every creditor to the full amount of his demand, and the sum raised by the Master represents not any demand of the shareholders *inter se*, but the aggregate demand of all the creditors on the whole partnership. The solvent shareholders are bound to make up this sum not by virtue of any engagement contained in the deed, but because by the general rules of law every partner is liable to the whole of the demand in the partnership, *per* the Lord Chancellor.¹

Whether the demand for contribution by a shareholder who has paid more than his ratable proportion would be such as to give him under the clause above referred to a claim by way of specialty or only as a simple contract debt, *quære*.

¹ See Greenwood's Case, 3 De G., M. & G. 476, note (1) and cases cited; *In re Agriculturist Cattle Ins. Co.*, Baird's Case, L. R. 5 Ch. Ap. 733; 1 Lindley Partn. (Eng. ed. 1860) 300 *et seq.*, 628, 629, 635, 642, 643.

THIS was an appeal by the official manager of the Royal Bank of Australia, from a decision of the Vice-Chancellor STUART, holding that in the administration of the estate of a testator who had executed the company's deed, a call under the Winding-up Acts did not rank as a specialty debt, and that it was an original liability unaffected by the legal quality of the liability on which a person becomes a contributory.

The following are the circumstances out of which the question arose: The Royal Bank of Australia was a company formed under a deed of settlement dated the 3d of August, 1840, which was expressed to be made between the several persons executing * 573 it of the first part, * and the persons therein named as contributories of the second part; and it witnessed that each of the persons, parties thereto of the first part, so far as related to the acts and deeds of himself, his heirs, executors, and administrators, covenanted with the others, and each of the others of them, their and his executors, administrators, and assigns, jointly and severally, and also by way of separate covenant with the parties thereto of the second part, their executors and administrators, in manner thereafter specified.

By the 3d clause of the deed it was provided, that "the capital of the company should be 1,000,000*l.*, divided in 20,000 shares of 50*l.* each, and the proprietor of each share should bring in and pay to the company the full sum of 50*l.* in respect of such share, as and when called upon so to do in manner thereafter provided, the sum of money previously brought in or paid in respect of the same share being allowed as part of such sum of 50*l.*, and the capital for the time being paid and brought in should be used and employed in the business of the company, and each of the proprietors should be entitled to the profits and liable to the losses of the company, in proportion to his share."

By the 49th clause it was provided that the court of directors should have power to make such calls for money from the several proprietors, not exceeding in the whole, including the sums already paid or brought in in respect of such share, the sum of 50*l.* on each share, as the court of directors should from time to time find necessary; and notice stating the amount of each call, and the time appointed for payment of the same, should be given by advertisement inserted in the London Gazette, and in such public newspapers as the court of directors should think proper.

* Joseph Phelps Robinson, one of the directors of the * 574 company, was a subscriber for and executed the deed of settlement in respect of 20 shares of the company, each director being obliged to hold 20 shares as a qualification. The directors subsequently resolved, without the privity of the shareholders, to appropriate to themselves a certain amount of additional or credit shares, which they were to pay for by giving promissory notes for the amount for which each subscribed. J. P. Robinson agreed to take, and he gave a promissory note in payment for 100 of such credit shares; he also signed a letter binding himself to pay the deposit and calls on them, but did not execute the deed in respect of them. Eight years after the execution of the promissory note, J. P. Robinson died without having paid any interest on, or any part of the principal of the promissory note, but in the books of the company credit was given to him in respect of dividends on the credit shares, and he was charged interest upon the promissory note. On the company being wound up, it was held that his executor, the respondent A. G. Robinson, was rightly placed on the list of contributories, not only in respect of the 20 shares, but also in respect of the 100 credit shares, although the creation of the credit shares was not warranted by the deed, nor were they in fact ever issued or allotted. (a)

Some time after this decision, A. G. Robinson, the executor, having been accordingly placed on the list of contributories, paid a sum of 550*l.* by way of compromise of a call made by the official manager, and then proceeded to distribute the assets of the testator's estate. In 1854, and subsequently to the distribution of the testator's estate, a further call was made of 100*l.* per share upon the contributories. A. G. Robinson resisted its * payment on the ground that the call in question was not * 575 a specialty but a simple contract debt, and that the assets of the testator were fully distributed in payment of simple contract debts. The Master (RICHARDS), before whom the point was originally raised, disallowed the payment made in respect of the testator's simple contract debts, on the ground that the call under the Winding-up Acts was a specialty debt. A. G. Robinson appealed to the Vice-Chancellor STUART, who, having called in the assistance of Mr. Justice ERLE, held, in concurrence with the

opinion of that Judge, that the call in question did not constitute a specialty debt. From that decision the official manager appealed, and the appeal was first argued before the Lord Chancellor and the Lords Justices on the 23d, 24th, and 28th of January, 1856, and was upon the 28th of June reargued before the full Court of appeal, assisted by Mr. Justice CRESSWELL and Mr. Baron MARTIN.

Mr. Malins and *Mr. Roxburgh*, for the official manager, in support of the appeal. — We submit that the rights and liabilities of parties concerned in any undertaking are not affected by the provisions of the Winding-up Acts, which were passed for the purpose of facilitating the process of liquidation to avoid suits for contribution, and not of adding to or subtracting from any existing right. *Carrick's Case*. (a) Here the liability was incurred by the testator under his covenant to pay, not only to the extent of 50*l.* per share, but to contribute to all the losses; and therefore all sums called up within 50*l.*, beyond all doubt, constitute a specialty debt; and he is equally liable on the 100 additional shares as on the original 20. *Straffon's Executors' Case*. (b) It was urged that there was no call by the directors within the meaning * 576 of the 49th clause in the deed * of settlement, and therefore that there has been no breach of the covenant; but that does not exonerate the estate of shareholders from liability as members of the company from contributing whatever they were bound to contribute by contract under seal with the company. In short, though the form of recovering the amount due may not be *modo et formâ* the same as under the deed, yet in substance the liability remains. *Cope's Case*, (c) *Lord Talbot's Case*, (d) *Hay v. Willoughby*, (e) *Ex parte Gouthwaite*, (g) and *Henderson v. Gilchrist*. (h)

THE LORD JUSTICE TURNER. — In *Hay v. Willoughby* (e) the main question raised was, whether the additional shares were subject to the same liability as the original shares.]

In *Hamer's Devisees' Case*, (i) the devisees were held to be

(a) 1 Sim. N. S. 505.

(b) 1 De G., M. & G. 576.

(c) 1 Sim. N. S. 54.

(d) 5 De G. & Sm. 386.

(e) 10 Hare, 242.

(g) 3 Mac. & G. 187.

(h) 22 Law J. Ch. 70.

(i) 2 De G., M. & G. 366.

contributories, and the calls a specialty, because under the seal of the testator. The calls are not a liability created under the Act.

[THE LORD JUSTICE KNIGHT BRUCE. — Calls for costs might be said to be a liability under the 83d section of the Winding-up Act, 1848.]

Secondly, it was said that, even if this was a specialty debt, it was only a contingent liability; that, however, will not prevent its having priority over simple contract debts, for according to the rule laid down by Mr. Justice WILLIAMS in his treatise on Executors, p. 818, "Where it is uncertain whether any thing will ever become payable on the special security, it shall not stand in the way of the payment of simple contract debts, but where a sum will certainly become due, though on a future day, the special security is entitled to priority like any other obligation of its class."

Cox v. Joseph, (a) *Musson v. May*. (b) The respondent will rely on the cases of *Read v. Blunt*, (c) and *Norman v. Baldry*, (d) but the opinion of Sir L. * SHADWELL in those cases * 577 is qualified by Mr. Justice WILLIAMS in his treatise on Executors, see pp. 819, 820, ed. 3. Here the executor had express notice of the liability, and must be held as clearly responsible.

Mr. Bacon, *Mr. Quain*, and *Mr. Stiffe*, for A. G. Robinson, in support of the Vice-Chancellor's decision. — We admit that, although the testator was bound by covenant to pay calls under the deed, yet we say that no such calls have been made, and it is clear that no action at law could be maintained for losses which might ultimately be sustained. The covenant at most is only to pay the losses, if any, to be ascertained under that deed, and not under the Winding-up Acts. There may be debts in respect of which a member of the company may be liable under those Winding-up Acts, and still there may be no losses within the meaning of the deed. It is also to be observed that under the 83d section of the Act 11 & 12 Vict. c. 45, persons may be put on the list of contributories without having signed the deed, without reference to the proportion of shares held by them as contributories, and in respect of costs which may be levied wholly irrespective of the

(a) 5 T. R. 307.

(c) 5 Sim. 567.

(b) 3 V. & B. 194.

(d) 6 Sim. 621.

deed. We submit that there can only be one kind of specialty debt, and that unless this is a debt on which an action at law could be maintained, it cannot be held to be a specialty debt in this Court. Assuming for a moment that this was a specialty debt, yet, inasmuch as no notice was given by the official manager of the impending liability, the assets have been distributed on the assumption that the penultimate call which has been compromised was the extent of the testator's contingent liability. We rely on the authority of *Read v. Blunt*, (a) *Norman v. Baldry*, (b) to * 578 show that a mere contingent liability will * not prevent the distribution of assets.

[THE LORD JUSTICE KNIGHT BRUCE. — The distinction referred to by Mr. Justice WILLIAMS, p. 820, between a mere contingent liability and a certain liability payable *in futuro* cannot now be controverted.]

This is not like the case of a suit for contribution; it is like a special bankruptcy jurisdiction conferred on the official manager as representing the assignee in bankruptcy; and if it had been a common partnership the official manager could not have proceeded against the estate of each individual member of the partnership as a specialty creditor; in short, his claim would be, not under but *dehors* the partnership deed. When the partnership ceased to exist the deed ceased to apply. *Ridgway v. Clare*, (c) *Ex parte Nicholas*. (d)

Mr. Roxburgh, in reply, referred to *Hole v. Harrison*. (e)

June 25.

On this day the Lord Chancellor said that the Lords Justices and he were desirous that the case might be reargued before them, assisted by two of the common-law Judges, who would be invited to attend.

June 28.

On this day Mr. Justice CRESSWELL and Mr. Baron MARTIN attended, and the case was reargued by one counsel on each side.

(a) 5 Sim. 567.

(d) 2 De G., M. & G. 271.

(b) 6 Sim. 621.

(e) 1 Ca. in Ch. 246.

(c) 19 Beav. 111.

Mr. Malins, for the official manager, in support of the appeal, repeated the former arguments, and in answer to a question put by the Lord Justice KNIGHT BRUCE as to * whether, in * 579 order to constitute a specialty debt in equity, it was necessary that an action at law should be maintainable, submitted that there was no such necessity, and referred to the cases of *Gifford v. Manley*, (a) *Benson v. Benson*, (b) *Mavor v. Davonport*, (c) *Turner v. Wardle*, (d) *Cummins v. Cummins*, (e) *Adey v. Arnold*, (g) *Ellis v. Ellis*. (h)

[The Lord Chancellor suggested that there might be a difference with respect to so much of the call as, together with the amount called up, exceeded 50*l*.]

It is not material under the circumstances of this case to consider that point, for the payment of the call even on the 120 shares up to 50*l*. would exhaust all the assets of the testator.

Mr. Bacon, in support of the Vice-Chancellor's decision. — The sentence in the 3d clause of the deed, commencing, "the sum of money previously brought in," down to the end of the clause, is parenthetical, and merely an explanatory provision on which no action of covenant would lie. In addition to the cases previously cited, he referred to *Wynch v. Grant*, (i) *Bright v. Hutton*. (k) The 3d, 29th, 34th, 71st, 76th, 82d, and 83d sections of the Winding-up Act, 1848 (11 & 12 Vict. c. 45), were commented upon.

Mr. Malins, in reply.

In the course of the argument the Lord Chancellor * men- * 580 tioned the cases of *The Cork and Bandon Railway Company v. Goode* (l) and *Shepherd v. Hills*. (m)

(a) *Ca. temp.* Talb. 109.

(b) 1 P. W. 130.

(c) 2 Sim. 227.

(h) Before the Lord Chancellor, 14th and 20th December, 1855, not reported; the reporters not being able to obtain the papers.

(i) 2 Drewry, 312.

(k) 3 H. L. Cas. 341.

(d) 7 Sim. 80.

(e) 3 Jones & Lat. 64.

(g) 2 De G., M. & G. 432.

(l) 13 C. B. 826.

(m) 11 Exch. 55.

November 24.

At the conclusion of the argument the learned Judges desired time to consider the question which had been submitted to them, and on the 24th November, 1856, Mr. Justice CRESSWELL, on behalf of Mr. Baron MARTIN and himself, delivered the following joint opinion : —

My Lord Chancellor, — This was an appeal from the decision of Vice-Chancellor STUART, and the question proposed for our consideration was, whether a call made on the executor of Joseph Phelps Robinson by the Master acting under the Winding-up Acts was to be considered as a specialty or simple contract debt. The testator was a shareholder in the Royal Australian Bank, and executed the deed of settlement. He died in August, 1848, before the Winding-up Act, 11 & 12 Vict. c. 45, received the royal assent. In 1850 an order for winding up the affairs of the company was made. Robinson's executor was placed on the list of contributors, and the official manager made a call of 100*l.* per share.

There are only two portions of the deed of settlement which appear to us material in considering this question. It was an indenture made between the several persons who executed the same (except the parties named of the second part) of the first part, and G. H. W. and J. H. (being persons nominated only as covenantees on behalf of the said parties of the first part) of the second part, and thereby each of the parties of the first part, so far as related to the acts of himself or herself, and his or her
 * 581 heirs, * executors, and administrators, but not further or otherwise, did for himself or herself, and his or her heirs, executors, and administrators, covenant with and to the others and each of the others, &c., amongst other things, in manner following, — and these are the two important parts of the deed :
 1st. That the capital of the company shall be 1,000,000*l.* divided into 20,000 shares of 50*l.* each, and the proprietor of each share shall bring in and pay to the company the full sum of 50*l.* in respect of such share as and when called upon to do so in manner hereinafter provided, the sum of money previously brought in or paid in respect of the same share being allowed as part of such sum of 50*l.*, and the capital for the time being paid and brought in shall be used and employed in the business of the company, and

each of the proprietors shall be entitled to the profits and liable to the losses of the company in proportion to his shares. 2d. That the court of directors shall have power to make such calls for money from the several proprietors not exceeding in the whole, including the sums already paid or brought in in respect of such share, the sum of 50*l.* on each share, as the court of directors shall from time to time find necessary, and notice stating the amount of each call and the time appointed for the payment of the same shall be given by advertisement inserted in the London Gazette, and in such public newspapers as the court of directors shall think proper.

Calls to the amount of 22*l.* 10*s.* on each share have been made, and were paid by the testator. On behalf of the appellant the argument was in substance that the call of the official manager was made on the executor in respect of the covenants entered into by the testator, and was merely an easy mode provided by the legislature for compelling the performance of those covenants, and not a new liability; that it was therefore * a * 582 specialty debt, although no action of covenant might have been maintainable, and that at all events so much of the call as would satisfy the 27*l.* 10*s.* on each share not previously called for by the directors must be treated as a specialty debt. On the other hand, it was contended that the powers and duty of the official manager, in winding up the affairs of the company, were far more extensive than any conferred by the deed of settlement, and that this call, being made by virtue of those larger powers, was an original liability, and derived no force from the covenants, and was not therefore a debt by specialty.

Many cases were cited during the argument; but we do not think it necessary to comment upon them, for having examined them, the question now raised does not appear to have been ever discussed and decided. We therefore assume that it is an open question depending upon the true construction of the Winding-up Acts; the material sections of which we proceed to consider. By the Act 11 & 12 Vict. c. 45, § 29, all the estate, effects, and credits and rights of action of the company are vested in the official manager. By the 34th section it is enacted, that he shall proceed with all convenient speed in doing various acts, and (amongst others) in paying the debts as therein provided, and in dividing and distributing the surplus assets of the company; and this is further provided for by sect. 82. By sect. 71, he is ordered to make out

a list of debts and demands due or claimed to be due from the company, and that list he is to correct from time to time by the decisions of the Master with reference to the allowance or disallowance of such debts and claims, so that it may correctly represent the state and condition of the company in regard to the debts and demands due or claimed from or against them; and in such

list the official manager, in cases where it shall be necessary * 583 or convenient for the purposes of the winding * up, shall

enter the dates or times at which such debts or demands, or any of them respectively, were contracted or became due. Sect. 76 enacts, that the official manager shall make out a list of the members and other contributories of such company, and the number of shares or extent of interest to be attributed to each; and such list shall, as far as practicable, distinguish the several classes of contributories. The meaning of the word "contributory" is explained by the interpretation clause, sect. 3. It includes every member of a company, and also every other person liable to contribute to the payment of any of the debts, liabilities, or losses thereof, "whether as heir, devisee, executor, or administrator of a deceased member, or as a former member of the same, or as heir, devisee, executor, or administrator of a former member of the same, deceased or otherwise howsoever;" and this explains the necessity of ascertaining (as provided by sect. 71) the dates at which debts due from the company were contracted, in order that the extent of the liability of former members or their representatives may be determined. Having provided for ascertaining the debts due from the company and the parties respectively liable to pay them, or any of them, sect. 83 gives the Master power to make calls. Again referring to the interpretation clause, "call" is explained to mean "a demand or requisition" on the contributories of a company made or to be made for a contributory payment towards the funds or assets thereof, or for or towards the payment or discharge of any of the debts, liabilities, or losses of such company, or otherwise. The power to make calls is given in these terms. That at any time before the whole of the assets of such company shall have been collected or converted, and if the assets remaining to be collected and converted shall not be capable of being immediately realized, although such assets may not appear

to be insufficient, and also after the assets of the company * 584 shall * have been wholly exhausted, it shall be lawful for

the Master from time to time to make calls on the contributories, or on such individual contributories or classes of contributories as he may think proper (but so far only as such contributories shall be liable at law or in equity to pay the same), as well for raising such amount as may be necessary to pay the debts or liabilities, or any of the debts or liabilities of such company, or any part thereof, or the costs, charges, and expenses of winding up the same, as also for adjusting and settling the respective claims of contributories upon each other, or upon the company, &c. The limitation of the Master's power here introduced, "but so far only, &c.," we take to refer to what follows, not to that which precedes it; and the true meaning appears to be, that the Master may make calls on any contributory for the amount of any debts of the company which he is liable at law or in equity to pay, although many others may also be liable.

Now every partner is liable to the creditors for the whole of the debts due to them on contracts made when he is a partner; former partners, on the same principle, are liable for debts contracted in their time; and the dates and times when the several debts of the company were contracted having been ascertained, the Master would have the means of knowing to what extent each contributory would at law or in equity be liable to pay them, and therefore to what extent he might make a call upon any individual contributory or class of contributories; that, and that only, is the limit put upon the Master's authority. Vice-Chancellor Lord CRANWORTH appears to have assented to this construction of the section in *Upfill's Case*, (a) with which we entirely agree.

After paying all debts and liabilities, the official manager, under the direction of the Master, is finally to wind * up the * 585 partnership. In order to do that, he must of course settle the claims of the partners *inter se*. Now, assuming for the sake of argument that in finally winding up the concern and settling the rights of the shareholders *inter se*, the official manager would be acting upon and working out the covenants entered into by the shareholders to pay certain calls and to bear losses in proportion to their shares, and that money called for in order to give effect to those covenants would be a specialty debt, it appears to us that the whole scope and object of the Winding-up Acts is much more

(a) 1 Sim. N. S. 395.

extensive; that the calls made under them are primarily to pay creditors as a step towards the final winding up, and cannot be referred to any covenants contained in the deed of settlement, but to the statutory powers conferred by the legislature. We have on this ground come to the conclusion that the call in question cannot be treated as a debt due by specialty.

During the argument reference was made to the case of *The Cork and Bandon Railway Company v. Goode*, (a) where it is supposed to have been held by the Court of Common Pleas that a call made by virtue of an Act of Parliament was a specialty debt; but upon its being pointed out by *Mr. Bacon* that the Winding-up Act, 1848, did not pass until after the death of the testator, the matter was not further pressed, and we think the decision in the Common Pleas is not an authority for our guidance in this case.

December 4.

THE LORD CHANCELLOR. — The question in this case is whether the sum payable by the executor of Joseph Phelps Robinson, a deceased shareholder, in respect of a call made by the Master under the Winding-up Acts, is a specialty or a simple * 586 * contract debt. It has been several times before the Court, and though the amount in dispute is not large, yet we were told that there are many similar cases, and so that the decision is one of considerable importance. Master RICHARDS held, that the money due on the call was a specialty debt, and so that the executor could not discharge himself by showing that he had paid simple contract debts of the testator. This decision of the Master was brought by way of appeal before Vice-Chancellor STUART, who, as it turned merely on a legal question, obtained the assistance of Mr. Justice ERLE, and eventually, in concurrence with his opinion, came to a conclusion opposite to that at which the Master had arrived, and by an order, dated on the 20th of December, 1855, declared that the call ranked as a simple contract debt only. From this order there was an appeal, which was heard by the full Court early in this year. We were, however, unwilling to come to a decision on a purely legal question without having the advice of some of the common-law Judges, and the case was therefore reargued before us shortly before the long vacation, when we had

(a) 13 C. B. 826.

the valuable assistance of Mr. Justice CRESSWELL and Mr. Baron MARTIN. Mr. Justice CRESSWELL last week delivered the written opinion of himself and Mr. Baron MARTIN, concurring with that of Vice-Chancellor STUART and Mr. Justice ERLE.

Being, as we now are, prepared to affirm the order of Vice-Chancellor STUART, I should probably have thought it unnecessary, after the elaborate opinion delivered by Mr. Justice CRESSWELL, to do more than to express my concurrence in the view of the case taken by the learned Judges, were it not that I believe my learned brothers concur in the present decision rather in deference to the great weight of authority in its favour than from being altogether satisfied with it. This being so, I will state in a few words the ground on which my opinion rests. * It is certain that * 587 the Master's call does not of itself create a specialty debt.

If any partnership or association not formed by deed should be wound up under the provisions of the Winding-up Acts, and a call should be made for raising money to liquidate its debts, the liability to pay such a call would be only a simple contract liability. This was not disputed, and the whole question turned on the point whether, by the terms of the deed under which this company was constituted, the call is made a debt by specialty due from the contributory on whom the call is made. If this be the effect of the deed, it must be in consequence of the 1st and 3d clauses of the deed. [His Lordship here read these clauses, see *ante*, p. 573.] The argument was that this 3d clause amounted in effect to an engagement under seal on the part of every shareholder to contribute ratably with the other shareholders to the losses of the company, and that the amount of each contributory's call is in effect his share of the losses, to which he thus bound himself to contribute. But I do not think that this is the fair view of the case. What the shareholder has to pay here in consequence of the Master's call, is something which he would have been liable to pay independently of any such stipulation as that contained in the 3d clause. Every shareholder, as a partner, is liable to every creditor to the full amount of his demand, and the sum raised by the Master represents not any demand of the shareholders *inter se*, but the aggregate demand of all the creditors on the whole partnership. The solvent shareholders are bound to make up this sum, not by virtue of any engagement contained in the deed, but because by the general rules of law every partner is

liable to the whole of the demands on the partnership. To put an extreme case, if there had been but one solvent shareholder, there is no doubt a call might have been made on him for an amount equal to all the debts due from the partnership.

* 588 How could it be said that he was liable to * pay that sum

because he had been party to a deed in which it was stipulated that every shareholder should be liable to the losses of the company in proportion to his shares? If in such a case the clause in question would not be applicable, neither can it be so when there are many solvent shareholders. In the one case, as in the other, the liability is not the consequence of the stipulation in the deed, but of the general liability of the shareholder to the creditors. When, indeed, the money has been raised and the demands on the partnership have been liquidated, the shareholder who has paid a sum exceeding his ratable proportion, calculated on the number of his shares, will have a right of contribution against the other shareholders, and the extent of that right must be measured according to the provisions contained in the 3d clause of the deed. It is not necessary for me to say whether this demand for contribution would be such as to give him a claim by way of specialty or only as a simple contract debt. That must depend on the question whether the words at the end of the 3d clause amount to an engagement to pay, or are merely a declaration as to the proportions in which each shareholder shall be liable.

I need hardly say that, according to the view I take of this case, any call made by the directors under clause 49 for payment for the full capital of 50*l.* per share would have created a specialty debt by virtue of the express covenant contained in the 3d clause; but the call made by the Master has no reference to the capital, and is a call to which, in my opinion, the 3d clause has no reference. On these grounds, thus shortly stated, I concur with the judgment of the Vice-Chancellor.

THE LORD JUSTICE KNIGHT BRUCE. — Had this case been brought directly and immediately from the Master before the present

* 589 Lords Justices, and * heard by them in the absence of the Lord Chancellor and without any judicial assistance (a supposition which of course excludes the opinions of Mr. Justice ERLE and the Vice-Chancellor STUART, those of Mr. Justice CRESS-

WELL and Mr. Baron MARTIN, and that of the Lord Chancellor), I am not sure that my judgment (which might not or might have been efficacious as differing or not differing from the view of the Lord Justice TURNER) would not have been in conformity with a note made by me at a certain stage of the arguments merely for the purpose of preserving a record of the impression at that time on my mind. I will read the note. It is in these terms:—

My impression is, that, according to the true construction of the deed of settlement of the 3d of August, 1840, Mr. Robinson ought to be considered as having covenanted by it in respect, not merely of the twenty shares which he held when he executed it, but also of the 100 other shares afterwards taken by him; and that there is no difference in the liability of his assets, with regard to the 20 and with regard to the 100 shares. The total amount of the sums which he and his estate have paid in respect of the 120 shares falls short, I believe, of 4000*l*. If, therefore, his estate is, under the deed and by reason of the deed, liable to make good the full amount of 50*l*. (the sum mentioned in the third clause) upon each share, there remains of course, I suppose, a sum exceeding 2000*l*. due from his estate on this account, under the deed and by force of the deed. Is, then, his estate so liable? To say that this must depend on the amount of the losses of the company within the meaning of the 3d clause is probably to state the case, if not too favourably for the executors, at least not too unfavourably to them. The amount of those losses, however, is such that Mr. Robinson's proportion of them in respect of his 120 * shares exceeds certainly, I think, 6000*l*.; * 590 and, if what he and his estate have paid on account of the 120 shares falls short of 4000*l*., there remains, of course, as it seems to me, a sum of 2000*l*. and more now due from him for losses. His estate, therefore, must necessarily, I conceive, be now liable to an amount exceeding 2000*l*. by virtue of the deed. To what amount more precisely the value of the assets renders it unnecessary to determine.

That liability is contended, and I am disposed to think not erroneously contended, to be, by reason of the deed only, or by reason of the deed and otherwise, a liability by specialty. We are, however, upon a call. The word "call" and "contributory" are defined or explained in the third, and "calls" and "contributories" are especially subjects of the 83d sections of the Statute of the 11th & 12th of the Queen, c. 45 (the statute of 1848). Mr. Robinson or his

estate is liable unquestionably to the call now under consideration, but is so liable because he executed the deed, and the call appears to be, to some extent at least, if not wholly, a just demand, directly founded on a covenant upon his part contained in the deed. When I say "to some extent at least," I mean to an extent at least sufficient to cover all that substantially the official manager now claims. Certainly I am disposed to consider that the Master's decision or certificate of the 30th of July, 1855, may well stand except to the extent of being varied by directing the allowance, to the executors, of those sums, to the allowance of which to them the official manager, by his counsel, before us, consented; and by declaring also (he likewise, as I understand, consenting) that the amount of his claim upon specialty against the assets of Mr. Robinson, shall be taken as not exceeding 2000*l*.

* 591 Now I am not convinced that the view thus stated is *inaccurate, but I must not forget that the matter has not come before the Lord Chancellor and Lords Justices, or before the Lords Justices, directly and immediately from the Master. I must not forget that the Court, of which I am a member, is asked to discharge or vary an order of one of the Vice-Chancellors. I must bear in mind the assistance that his Honor had, and not only what the opinion of the Vice-Chancellor STUART, in accordance with that of Mr. Justice ERLE, is, but also the assistance that the Lord Chancellor and Lords Justices have had, and what the opinions of Mr. Justice CRESSWELL and Mr. Baron MARTIN are, and what the opinion of the Lord Chancellor.

Attending to these considerations, I think myself warranted, as to the case before us, in deferring and submitting to the united authority of so many learned Judges to the extent, and in the sense at least, of treating the question of the correctness or incorrectness of the Vice-Chancellor's order under appeal, as too seriously and substantially doubtful to render its reversal or variation proper; and in declining, therefore, — and accordingly I do decline, — to give a voice for reversing or varying it. The application of the official manager will stand dismissed.

THE LORD JUSTICE TURNER. — The weight of judicial authority which has been applied to this case, preponderate so much in favour of the order under appeal, that I feel myself constrained to cede the opinion which I had formed upon the case. That opinion

was shortly this. That the main purpose of the Winding-up Acts is not to secure the interest of creditors, whose interests are in substance not affected by the Acts, but to enable the legal and equitable rights (as between themselves) of persons, united together in large bodies for commercial and other purposes, to be effectually adjusted * and settled; it having been found impossi- * 592 ble that such rights could be adjusted by the Courts of the country, proceeding in their ordinary course. That the provisions as to creditors contained in the Acts are subsidiary to this purpose. That the legal and equitable rights to be adjusted must depend upon the contracts into which the parties had entered, and that the force and effect of those contracts was not intended to be, and is not, in any respect, altered by the Acts. That the powers to make calls given by the Acts constitute the medium provided by the legislature for working out these legal and equitable rights. That this has been the view in which the Court has hitherto regarded these Acts, and that it would be dangerous now to disturb it. That, adopting these principles, the question in this case, whether the amount of the call ought to be considered as a specialty or simple contract debt, must depend upon the company's deed of settlement. That by that deed there was a contract under seal by the testator, and a liability under that contract to the full amount now claimed by the appellant in respect of the call, and that a Court of Equity would give effect to that contract as a specialty, whether an action at law could or could not be maintained upon it.

These are shortly the views which I had entertained of this case, but they are at all events, to a considerable extent, and certainly in the result, opposed to the views entertained by the Lord Chancellor and Vice-Chancellor, and by all the learned Judges who have been consulted upon the case; and under these circumstances, although I have been unable to divest my mind of the impression that the conclusion at which I had arrived is the correct conclusion, I think it more proper for me to bow to the authority of those who have arrived at the opposite conclusion, than to persist in my own opinion. I do not, therefore, dissent from the order proposed by the Lord Chancellor.

1856. November 10. Before the Lord Chancellor Lord CRANWORTH.

A testator by his will gave certain portions of his property to one of his daughters and her children, and the residue, which was the greater portion, to another daughter and her children. By a codicil he said, "I cancel that part of my will settling on my daughters and their children my property, and my sons-in-law H. and A. may dispose of the property I leave for the good of their families: *Held*, that the sons-in-law took absolute interests in the portions given by the will to their respective wives.

THIS was an appeal from the decree of the Vice-Chancellor STUART on motion for a decree upon the construction of the will and codicil of General Dallas. The general by his will after making a schedule of his real and personal estate gave certain portions thereof, charged with certain legacies and annuities, to his daughter Janet, the wife of William J. Alexander, and her children, and the residue, which was the greatest share, and also charged with certain legacies, to his daughter Dona, the wife of F. Harding, and her children. By a codicil the testator expressed himself thus: "In consequence of the difficulty of getting 300*l.* for Captain F. Harding (which he must pay from what I leave him in my will) from the 3000*l.* I settled on his family and I obliged (*a*) to become guarantee for his repaying of it, I now cancel that part of my will settling on my daughters and their children my property, and my sons-in-law Captain F. Harding and William J. Alexander may dispose of the property I leave for the good of their families, subject to the said legacies."

When the case was heard before Vice-Chancellor STUART, his Honor held that no trust was created by the codicil in favour of the testator's daughters and their children, and that F. Harding and W. J. Alexander took equal absolute interests as tenants in common in the property subject to the payment of the legacies. F. Harding now appealed to the Lord Chancellor from that portion of the decree which declared that the gift to himself and W. J. Alexander was in equal shares.

(*a*) *Sic.*

* *Mr. Malins* and *R. R. A. Hawkins* appeared for the * 594 plaintiffs the trustees, but took no part in the argument.

Mr. Walker and *Mr. Webster*, for Captain F. Harding, in support of the appeal. — The testator has by his will given his property in unequal shares, and there is no evidence of intention in the codicil to alter that inequality. It is a well-established principle that a revoking clause in a codicil is not to have a more extended signification than what is necessary for effectuating the intention of a testator; in short, that a codicil is only to be construed as an auxiliary instrument. *Leacroft v. Maynard*, (a) *Matthews v. Bowman*, (b) *Beckett v. Harden*, (c) *Young v. Hassard*, (d) *Plenty v. West*, (e) *Shea v. Boschetti*, (g) *Molyneux v. Rose*. (h)

Mr. Wigram and *Mr. Udney*, for Mr. Alexander, in support of the Vice-Chancellor's decision. — The will only contains specific bequests of specific property. Can it be said that if the testator had left considerably more property that the codicil would not have operated? There was clearly an equality intended in the gifts to the sons-in-law as provisions for the testator's two daughters: *Jolliffe v. East*; (i) and the codicil cannot be regarded as merely substitutionary: *Holder v. Howell*, (k) *Cole v. Wade*. (l)

Mr. Walker, in reply.

THE LORD CHANCELLOR. — I entertain a different opinion from that expressed by the Vice-Chancellor in this case, which does not appear * to have been fully argued before him. * 595 I arrive at the conclusion that the sons-in-law of the testator were under the codicil to take absolute powers of disposition over nothing more than what was given to the testator's daughters by his will. It is exceedingly difficult, in construing wills couched in such loose language, to understand the meaning; but I think that the testator did not by his codicil intend to alter the quantity

(a) 1 Ves. Jr. 279; S. C., 3 Bro. C. C. 238.

(b) 3 Anst. 727.

(c) 4 M. & S. 1.

(d) 1 Dru. & War. 638.

(e) 16 Beav. 173.

(g) 18 Beav. 321.

(h) 2 Jurist, N. S. 769.

(i) 3 Bro. C. C. 25.

(k) 8 Ves. 97.

(l) 16 Ves. 27.

of the estates which by his will he had intended for his daughters respectively, but only to substitute a disposition which would give an absolute power of disposal over the same estates to the husbands of his daughters. [His Lordship here read the will and codicil, and proceeded:] I think the expression in the codicil "the property I leave for the good of their families" means the same thing as if he had said, — the property I leave in manner aforesaid. It is true that the expression "the property I leave," &c., might be construed so as to apply to any other property he might leave irrespective of that which he had specified. I need not, however, speculate as to what would have been the consequence if such a state of circumstances had existed, nor do I think it would be applying a philosophical or logical method of interpretation to speculate on the result of a state of circumstances which might have arisen, but which the testator never contemplated would arise. Assuming, then, that by the words "the property I leave," &c., the same subject-matter is intended as by the words "my property" in the preceding sentence in the codicil, there is no necessity to resort to any such doctrine as that of a tenancy in common. In addition to this it is to be observed that by the will there are unequal charges on the shares of each of the daughters. The decree must be varied by declaring that the sons-in-law took absolute interests in the portions of the property given by the will to their respective wives.

1856. November 14, 17, 19. Before the Lord Chancellor Lord CRANWORTH.

The devisee of an insolvent debtor who had taken the benefit of the Act 5 & 6 Vict. c. 116, and who had obtained a release in full from all his creditors: *Held*, entitled to sustain a bill in equity in respect of surplus real property, which had been conveyed by the official assignee, without going through the process of applying to the Insolvent Court for an order revesting the property in the assignee of the insolvent.¹

¹ See 1 Dan. Ch. Pr. (4th Am. ed.) 61, 62; *Cook v. Sturgis*, 8 De G. & J. 506.

THE bill in this suit was filed by J. Wearing, the devisee of John Harrison, an insolvent, for the purpose of obtaining a reconveyance of certain real estate which had once belonged to the insolvent under the following circumstances. John Harrison became insolvent in February, 1843, and filed his petition in the Leeds district Court of Bankruptcy for protection as an insolvent debtor under the Act 5 & 6 Vict. c. 116, and the usual order was thereupon made vesting his estate and effects, real and personal, in E. Young as the official assignee. At the time of the insolvency J. Harrison was entitled to certain real estate in fee-simple in reversion expectant on the death of his mother.

In 1844 all the creditors of J. Harrison accepted a composition of 3s. 6d. in the pound, and executed a release in full. The sum required for the composition was advanced by the plaintiff with the aid of J. Cowburn, a solicitor. In 1846, and in consideration of that advance and before the reversionary interest fell into possession, the official assignee arranged with the plaintiff that the reversionary interest should be conveyed by the official assignee to the plaintiff as a security for his advance and subject thereto for the insolvent J. Harrison. This conveyance (whether by accident or otherwise is immaterial for the purposes on which the decision in this case is reported) was made to J. Cowburn instead of to the plaintiff.

In the following year (1847) the reversionary interest * fell into possession, and J. Harrison then entered into pos- * 597 session and enjoyed the premises during his life. He died in 1849, and devised the estate to the plaintiff. In 1854 a question was raised on the part of Cowburn that he was *bonâ fide* and beneficially entitled to the estate, but he subsequently became insolvent; and his assignee put up the property for sale when the defendant Ellis became the purchaser. The object of the bill, which *inter alia* charged that all the creditors of J. Harrison were satisfied and had executed a release, was to obtain a declaration that by the conveyance of 1846 Cowburn was not entitled to any beneficial interest in the premises, but was a trustee of the legal estate in trust for J. Harrison. The defendant insisted that until an order had been obtained from the Insolvent Court revesting the estate in Harrison, the plaintiff as his devisee had no title to sue.

The question came on before the Vice-Chancellor STUART on the

16th January, 1856, on motion for a decree, when his Honor held that there being an admitted surplus there was a virtual end of the insolvency, and decided in favour of the plaintiff's right to sustain the bill. From that decree the defendant now appealed to the Lord Chancellor.

Mr. Wigram and *Mr. Toller*, for the plaintiff, in support of the decree of the Vice-Chancellor. — The question is, What is the status of an insolvent debtor after all his debts are paid? We will admit for the purpose of the argument that when the property remains in the official assignee it would be necessary to get the estate revested in the insolvent, yet where as in the present case the official assignee has duly divested himself of the legal estate for value and conveyed his right and interest therein, it is * 598 absurd to obtain a revesting order. In the * authorities which will be relied on of *Kernot v. Pittis*, (a) *Rochfort v. Battersby*, (b) and *Tudway v. Jones*, (c) there was no evidence to show that the debts of the insolvent were all paid, and in each of those cases the proceedings in insolvency were in full force, which distinguishes them from the present case. Here the jurisdiction in insolvency was at an end. Having regard to this distinction, where a bill was filed by a bankrupt and contained an allegation that all the debts were paid a demurrer was overruled. *Lautour v. Holcombe*. (d) It is also to be observed that the insolvency in the present case is not under the 1 & 2 Vict. c. 110, but under the 5 & 6 Vict. c. 116, the first section of which referring to adopts the provisions of the 6 Geo. 4, c. 16, and by the 132d section of that Act the assignees are required after payment of all the debts to pay over the surplus to the bankrupt.

Mr. Malins and *Mr. Prendergast*, for the defendant, in support of the appeal. — We submit that the proper course under the circumstances would be for the plaintiff to apply to the Insolvent Court to appoint a new assignee to get a reassignment of the estate by means of the vesting order prescribed by the 92d section of the 1 & 2 Vict. c. 110. The estate being wrongfully conveyed is, as it were, not conveyed at all, and if so, according to the doctrine of this Court, was never divested out of creditors for whom

(a) 2 Ell. & Bl. 406.

(c) 1 K. & J. 691.

(b) 2 H. L. Cas. 388.

(d) 8 Sim. 76.

the assignee was a trustee: *Stump v. Gaby*; (a) and when a new assignee is appointed the estate would revest in him by relation; at all events it is quite clear that an insolvent cannot sue without having the estate revested in him, and the mere allegation of a surplus will * not dispense with the necessity of having * 599 the assignee before the Court. *Rochfort v. Battersby*. (b)

Assuming that all the creditors in the insolvent's schedule have fully released his estate, there may still be other unsatisfied creditors for whom the official assignee would be a trustee.

By the 37th section of the Act 1 & 2 Vict. c. 110 all the real and personal estate of the insolvent vests in the provisional assignee, and there being no mode under the Act 5 & 6 Vict. c. 116 to get the estate back, it cannot be got back except by the means indicated in the 92d sect. of the 1 & 2 Vict. c. 110. [They relied upon the cases of *Kernot v. Pittis*, (c) *Tudway v. Jones*, (d) and *Cooke v. Sturgis*, (e) before the Lords Justices.]

Mr. Wigram, in reply. — In the present case the proceeding is not, as the appellant contends, under the 1 & 2 Vict. c. 110, but under the 5 & 6 Vict. c. 116, and the Bankrupt Act therein referred to is the 6th Geo. 4, c. 16, by the 132d sect. of which Act there is an express direction to pay the surplus of the real and personal estate to the bankrupt, which words as referable to real estate must imply or amount to a direction to reconvey. In none of the cases relied upon by the appellant was there a suggestion as in this case that the proceedings in bankruptcy had come to an end, an element which constitutes a material distinction between them and the present. On this principle where a bankrupt filed a bill to redeem a mortgage, and an objection was taken by the mortgagee that the estate, if any, was vested in the official assignee, such objection was not sustained. *Preston v. Wilson*. (g)

* The Lord Chancellor at the conclusion of the argument * 600 said: I will not finally dispose of this case without looking into the authorities which have been cited. I may observe, how-

(a) 2 De G., M. & G. 623; see p. 630.

(b) 2 H. L. Cas. 388.

(d) K. & J. 691.

(c) 2 Ell. & Bl. 406.

(e) Weekly Reporter, 1853-1854, page 389.

(g) 5 Hare, 185.

ever, that some points connected with the question before me are quite clear. As a general rule it is established that no question can be litigated between a bankrupt and a third party with respect to any alleged property in the bankrupt without the sanction of the Court of Bankruptcy, which has exclusive jurisdiction in the matter. In other words, a bankrupt cannot sue but by his official assignee. I am of opinion that the same doctrine applies to insolvency. I think the cases of *Kernot v. Pittis*, (a) *Tudway v. Jones*, (b) are distinguishable from the present, inasmuch as in those cases the insolvencies were subsisting, and nothing was done, as in the present case, to make them exceptions from the general rule to which I have adverted. Here, however, the assignee of the insolvent having executed a conveyance, which, for the purpose of the argument before me, I assume to be impeachable, and all the creditors being satisfied and having released the insolvent's estate, the question arises, by what process is the assignee to be compelled to account for the surplus? That is not precisely the question here, but it is one upon the due solution of which the case before me will have to be determined. The insolvency here is under the Act 5 & 6 Vict. c. 116, and the question is, by what process is the insolvent to get back the surplus of his estate when all his creditors have been satisfied? The language of the 6 Geo. 4, c. 16, § 132, under which this case falls, is that the assignees "shall upon request made to them by the bankrupt declare to him how they have disposed of his real and personal estate and pay the surplus, if any, to such bankrupt, his executors, administrators, or assigns."

* 601 * I should be inclined to say that such accountability to the bankrupt would give him a right of action. I do not commit myself to this opinion, but as at present advised I think it would give him a right of action. It may, however, be that the correct construction of that section is that the commissioners of bankrupts are the proper persons to compel the assignee to account with the bankrupt. There is no express provision in the Act (6 Geo. 4, c. 16) as to how the surplus of the real estate of the bankrupt is to be dealt with, but if after payment of the debts of a bankrupt he is entitled to sue for the surplus money, it would, I think, imply an authority in this Court to entertain a

(a) 2 Ell. & Bl. 406.

(b) 1 K. & J. 691.

suit at the instance of the bankrupt for a reconveyance of the real estate.

I will consider the question and give my judgment in the course of a few days.

November 19.

THE LORD CHANCELLOR. — This case turns, so far as the present appeal is concerned, upon a very short point, which is this, whether an insolvent, having taken the benefit not of the ordinary Insolvent Act, but who has presented a petition under the Act 5 & 6 Vict. c. 116, and whose real and personal estate have been duly conveyed and assigned to an assignee under the provisions of 6 Geo. 4, c. 16 (all the creditors having been satisfied and the assignee having conveyed away the property which was vested in him), can maintain an action without first going through the process of applying to the Insolvent Court for an order discharging him and giving him the property back again. I did not at the hearing entertain much doubt upon the subject, but I wished to look into the Acts because there is a little conflict between the several Acts which were in * operation relating to bankruptcy and insol- * 602 vency, and those relating to insolvency *inter se*. At the time when the transactions, to which this suit relates, occurred, the Act 6 Geo. 4, c. 16, may be treated as being the Act which was in operation. That Act provides by the 132d section that the assignees shall, when called upon by the bankrupt, account to him for the mode in which they have disposed of his real and personal estate, and if there is any surplus after satisfying all the creditors in full with interest upon their debts, it enacts that they shall pay over the surplus, if any, to the bankrupt. I intimated an opinion at the conclusion of the argument that the language of that section gave a right of action to the bankrupt after his debts with interest were all satisfied. I do not myself see how that clause can be construed otherwise than as giving a right of action to the bankrupt. I do not find that this point has been expressly decided. The provision in question, however, has been since somewhat modified and altered, and it therefore is now a mere matter of speculation, though I think that must be the proper construction, because when a clause in an Act of Parliament declares that a person fulfilling a particular function shall, after certain conditions have been performed, pay over a sum of money to another, that of itself would give the other a right of action of debt against the

person for the sum which was so directed to be paid over. Not a word is said in the Act as to any property not being property capable of being paid over, as, for instance, real estate; but common sense would suggest that for which there is very clear authority, that as to such surplus the assignees would become trustees for the bankrupt. This was expressly so stated by Sir

WM. GRANT in the case of *Charman v. Charman*. (a)

* 603 The question arose there *in this way; there had been a devise of real estate, and after the date of the will the testator became bankrupt, and all his property of course became vested in his assignees. All his creditors were paid in full, and then he died; and the question was whether the bankruptcy operated as a revocation or not. Sir WM. GRANT felt very unwilling to hold any Act to be a revocation that was not done for the purpose of revoking the will, because whatever might be the technical consequences of bankruptcy it was only a means of making a man pay his debts, and he held that bankruptcy was no revocation; and he concludes his judgment by saying "from the moment that the debts are paid, the assignees are mere trustees for the bankrupt and can be called upon to reconvey to him." I think that a man can be called upon in this Court to reconvey; it is only an inference upon the general principles of the law, because the object of the bankruptcy having been fulfilled, although there is no statutory declaration that the assignees shall reconvey, yet upon the general principles of the law they may be called upon to reconvey, on the assumption put by Sir WM. GRANT that they are mere trustees for the bankrupt. That appears to be the rule as to bankruptcy. Now with regard to insolvency under the ordinary Insolvent Act, 1 & 2 Vict. c. 110, commonly called "The Imprisonment for Debt Act," in which all the laws relating to insolvency were remodelled and re-enacted, according to the 92d section of that Act it is expressly provided that after the debts have been discharged and satisfied then the Court for the Relief of Insolvent Debtors shall make an order vesting property in the person (the insolvent) whose debts shall have been so discharged and satisfied, the debts being those which are mentioned in the schedule. The Act also provides that the Court may direct the cancellation of the warrant of attorney which under the provisions of the Insolvent Act the insol-

(a) 14 Ves. 580; see p. 584.

vent * is bound to execute, so as to make it in the nature * 604 of a recognizance to give a right of action and a right of seizing any future property, if there should be any future property which should come to him for the benefit of his creditors. Such was the express provision in that Act. Then comes the Act with which we have to deal in this case ; namely, the 5 & 6 Vict. c. 116, which only provides, without going through all the provisions of the previous Act of the 1 & 2 Vict. c. 110, that any person not being a trader or being a trader, but owing debts amounting in the whole to less than 300*l.*, may present a petition to the Bankrupt Court, and then the effect of that petition will be to make him an insolvent or a *quasi* bankrupt, and to transfer all his property to the official assignee who is to be named by the commissioner of the Court to which the petition is presented, and then all the estate and effects of the petitioner become vested in the assignee to be dealt with as in bankruptcy. I think that the meaning of the legislature was there to make this a bankruptcy, that it was to be done through the medium of the bankrupt commissioner, and in the case of traders it might be done if the debts were below a certain amount, and in the case of a person not a trader, it might be done whatever might be the amount of the debts, and then the property was to be dealt with, according to the language of the Act, as if it were a bankruptcy. That being so, it is to the Bankrupt Act, 6 Geo. 4, c. 16, we must look, and looking to that Act I follow the language of Sir WM. GRANT, who states the clear view of the law, that the assignees, after the debts have been paid in full, become trustees for the insolvent. I cannot think it makes any difference that the creditors have not actually received twenty shillings in the pound ; if they have received that which they are minded and willing to take as if it were twenty shillings in the pound, it is the same thing. There can be no further demand by them. That being the * principle which is to guide us, we must * 605 look to what the facts of this case are. Mr. Harrison became insolvent in the year 1843, just after the passing of the Act 5 & 6 Vict. c. 116, to which I have referred, and took the benefit of that Act. At that time he was entitled to an interest in reversion or remainder in an estate of which his mother was tenant for life, and having taken the benefit of the Act all his property vested in his assignee. The petition was presented not to the insolvent commissioner, but to the district Court of Bankruptcy at
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Leeds. All his property then became vested in his assignee,—and *inter alia* of course this reversionary interest. What was done was this. Mr. Wearing, the present plaintiff, who was the friend of Mr. Harrison, seems to have agreed with him to employ a solicitor of the name of Cowburn, and through his assistance was enabled to find money to settle with Harrison's creditors and to pay them three shillings and sixpence in the pound, which they were willing and agreed to take in discharge of their debts. Mr. Wearing in truth was the person who advanced this money; and the arrangement was, that the property should be conveyed from the official assignee to Mr. Wearing, that he might have it as a security for his advances; and then, subject thereto, for Mr. Harrison's benefit. That was accomplished; and the assignee executed a deed and conveyed the property, but (whether by mistake or whether by fraud is not material for the present question) it was all conveyed, not to Mr. Wearing, subject to redemption by Mr. Harrison, as it ought to have been, but to Mr. Cowburn. Mr. Cowburn is dead, and the conveyance to him might have been perfectly honest or the reverse, but the intention obviously was, that the property was ultimately to be reconveyed to Mr. Harrison. That all took place in the year 1846. In the following year, 1847, the reversionary interest became an interest in possession. Mr.

* 606 Harrison then entered * and enjoyed it during his life.

After his death the plaintiff, who claims through him, enjoyed it. Then some years afterwards a question was raised on the part of the assignees in bankruptcy of Mr. Cowburn, that he was entitled to the estate for the benefit of his creditors, the assignee of Mr. Cowburn has put the property up for sale, and it has been purchased by the defendant. The plaintiff, claiming under Mr. Harrison, contests this, and alleges that it was all a fraud. Now the only question to which I have directed my attention is, whether the plaintiff, claiming under Mr. Harrison, can maintain such a suit, or whether the property must be gotten in and the question raised through a course of litigation which is to originate in the Insolvent Court by the appointment of a new assignee.

Now coming, as I do, to the conclusion that this bill can be sustained, I certainly should not have done so, had I not been perfectly satisfied that I do not in the slightest degree intrench upon the doctrine of any of the cases, laying down this proposition which ought to be the pole-star to guide us in questions of this sort;

namely, that this Court has nothing whatever to do with respect to the distribution of the property of a bankrupt or insolvent, the jurisdiction in which matters has by the legislature been transferred to the Court of Bankruptcy or the Insolvent Debtors' Court. In bankruptcy there is an appeal, while the decision of the Insolvent Court is absolute and supreme. But how does that doctrine apply to a case where the property, though it has been once vested in, has been conveyed by, the assignee, and after all the creditors have been satisfied? That they have been satisfied is not a matter of speculation: it appears from the insolvent's schedule that they have all been settled with and released; it is stated as a fact, and I take it to be clearly proved. The creditors therefore * cannot be heard to raise any objection; neither can the * 607 assignee be heard to contest the point; he has conveyed the property for a valuable consideration, and has been satisfied. Then the question must be looked at just in the same way as if the assignee had actually in the first instance conveyed the property to Mr. Harrison, and Mr. Harrison had conveyed it to Mr. Cowburn by mistake instead of to the plaintiff. It cannot under these circumstances be maintained that Mr. Harrison or those deriving title under him are debarred from claiming the property now because there was a time during which the property was in the officer of the Insolvent Debtors' Court.

It does not appear to me that any one of the cases to which I was referred have the least bearing upon the doctrine in question. In the case of *Kernot v. Pittis*, (a) in the Exchequer Chamber, the Court reversed the judgment of the Court of Queen's Bench, and I think there can be no doubt at all of the correctness of that decision. There the property became vested in the provisional assignee by virtue of the petition of the insolvent, and no steps were ever taken to get it out of the assignee: there it remained, having been once vested in him, and the question might pertinently be put, if it was once vested in him, how was it got out of him? If, however, that question is put here, the answer is that the estate is got out of him by means of his own conveyance. The case of *Heath v. Chadwick* (b) was also cited, in which Lord COTTENHAM goes into the question. But there the property was not only in the assignee, but was in the course of administration by him. The decision

(a) 2 Ell. & Bl. 406.

(b) 2 Phil. 649.

* 608 of the House of Lords in *Rochfort v. Battersby* (a) * was founded upon the same principle. I may observe, however, with reference to that case that though I should be very unwilling to express a doubt about any decision of the House of Lords, especially in a case which has been so much considered, yet that it seems a startling proposition, as stated in the marginal note, that a person being improperly made a defendant and against whom a decree has been pronounced (other than that of dismissal of the bill with costs) could not be heard to appeal. That is a proposition which I think is too broadly stated. I have no doubt but that the object of that appeal was that the bankrupt might get relief as it were in bankruptcy or insolvency, and not on the ground that he was improperly made a party. The case of *Tudway v. Jones* (b) was one in which matters were actually still pending in the Insolvent Court. The judgment in *Preston v. Wilson* (c) is exactly in conformity with the view I take on the present occasion.

On the whole, therefore, I think that the decision of the Vice-Chancellor is perfectly right, and that consequently this appeal must be dismissed with costs. I have not looked into the merits of the case, because I was informed by both parties that it was to be argued on the supposition that the equity raised by the bill was sustainable, and on that assumption I am of opinion that the technical objection cannot prevail.

1856. November 20, 22. Before the Lord Chancellor Lord CRANWORTH.

Although one of two executors or trustees may sue the other executor or trustee for contribution in respect of a breach of trust without making the *cestuis que trust* parties to the suit, yet where such *cestuis que trust* have participated in the breach of trust they are necessary parties.¹

THIS was an appeal by the plaintiffs from an order of the Vice-Chancellor STUART allowing an objection for want of parties.

(a) 2 H. L. Cas. 388. (b) 1 K. & J. 691. (c) 5 Hare, 185.

¹ See 1 Dan. Ch. Pr. (4th Am. ed.) 224, 226, 256 n. (3), 268, 269; Lewin Trusts (5th Eng. ed.), 711, 714.

The bill in this suit was filed by John Jesse, Stansfield Rawson, and Charles Rawson against John Newit Bennett, and it stated among other things that the defendant was the surviving executor and trustee under the will of Joseph Peers deceased, and that Joseph Ablett deceased was also an executor and trustee under the same will, and that the plaintiffs were the legal personal representatives of Joseph Ablett, and that certain breaches of trust were alleged to have been committed by the defendant and Joseph Ablett, which consisted *inter alia* in improperly lending part of the trust moneys to one of the *cestuis que trust*, and praying that all necessary inquiries might be made and accounts taken for ascertaining whether any and what act or acts were or was done or omitted to be done by Joseph Ablett and the defendant, or either of them, amounting to a breach or breaches of trust, rendering them or either of them or the estate of Joseph Ablett liable to make good such breach or breaches of trust, and that the proportions in which the defendant and Joseph Ablett's estate were respectively liable in respect of such breach or breaches of trust might be ascertained and declared, and that the defendant might be decreed to pay and contribute his proportion of the amount required to make good such breach or breaches of trust; the plaintiffs being ready and thereby * offering to contribute * 610 their proportion of such amount out of the assets of their testator liable for that purpose.

The defendant J. N. Bennett by his answer stated that, if any such accounts or inquiries as were prayed should be directed, the result would not bind any of the persons beneficially interested in the testator's estate, and that no contribution could be obtained therein from the several persons who, if any breaches of trust were in fact committed, had participated therein, and were liable to make good the same, and that he and the plaintiffs would be exposed to a multiplicity of suits in respect of the same matters.

The defendant then particularized a specific breach of trust in improperly advancing a sum of money to one of the *cestuis que trust*, who, he submitted, ought to be made a party and to contribute to the loss, if any, by such improper loan.

When the case came on to be heard before the Vice-Chancellor STUART on the 2d of July, 1856, the defendant took a preliminary objection to the frame of the suit on the ground stated in his answer. His Honor allowed the objection, but gave the plaintiffs

liberty to amend their bill. From that order the plaintiffs now appealed to the Lord Chancellor.

Mr. Malins and *Mr. Bernard*, for the plaintiffs, in support of the appeal, submitted that where a bill is filed by one trustee against his co-trustee to compel him to replace the trust fund which has been misapplied or appropriated by him, the *cestuis que trust* are unnecessary parties. *Franco v. Franco*, (a) *May* * 611 *v. Selby*, (b) * *Peake v. Ledger*, (c) *Ling v. Colman*, (d) *Bridget v. Hames*. (e) They relied confidently on the decision in *Robinson v. Evans* (g) as being a precise authority in their favour, and they argued that the objection was in effect that the bill ought to be framed with the view of having a general administration of the original testator's estate, whereas the plaintiffs' object was merely to relieve their testator's estate from the liability which had attached to it.

Mr. Bacon and *Mr. Druce*, for the defendant, in support of the Vice-Chancellor's order, contended that in every case where the *cestui que trust* has concurred in a breach of trust his estate was primarily liable. *Priddy v. Rose*, (h) *Perry v. Knott*. (i) They submitted that all the cases relied upon by the appellants were distinguishable from the present in this particular; namely, that the breach of trust in respect of which relief was asked against the defendant was participated in by a third party who was not before the Court.

Mr. Bernard, in reply. — According to the present practice of the Court, where several parties are jointly liable it is not necessary to bring all of them before the Court.

• The Lord Chancellor, at the conclusion of the argument, said: Before I finally dispose of this case I shall look at the pleadings, and consider the nature of the objection for want of parties as stated in the answer. There is no doubt as to the general * 612 rule that it is not necessary * to make the *cestuis que trust*,

(a) 3 Ves. 75.

(b) 1 Y. & C. C. C. 235.

(c) 8 Hare, 313.

(d) 10 Beav. 370.

(e) 1 Coll. 72.

(g) 7 Jur. 738.

(h) 3 Mer. 86.

(i) 5 Beav. 293.

quâ cestuis que trust, parties to a suit for the administration of the trust property. But anybody, whether he is a *cestui que trust* or a stranger, who has received the trust property and been guilty of a breach of trust, must of necessity be made a party to the suit. As to him the suit is just the same as if he were a trustee nominated in the instrument the trusts of which are to be administered. My present impression is that the Vice-Chancellor was right in giving effect to the objection.

November 22.

On this day the Lord Chancellor said that he had read the answer, and that he fully concurred with the Vice-Chancellor in thinking that the persons named in the answer as having participated in the breach of trust, and who by their conduct had put themselves in the situation of trustees, ought to be made parties to the suit.

* BOOTH v. ALINGTON.

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1856. November 14. December 2, 4, 5. Before the Lord Chancellor Lord CRANWORTH.

A donee of a power of appointment over a gross sum of money which in default of appointment was to be divided equally among her children appointed a specific sum which she described as being "part of" the gross sum; but she did not make any appointment of the residue. The gross sum proving deficient: *Held*, that the specific sum appointed was to be paid in full and not ratably out of the deficient gross sum.¹

THIS was the appeal of David Trevena Coulton, the personal representative of John Gillyatt Booth, from so much of an order of the Vice-Chancellor STUART made on the 16th April, 1856, upon exceptions and further directions as declared that a sum of 30,000*l.* appointed by a deed-poll executed by Elizabeth Booth was to be paid ratably and in proportion with the other parts of a legacy or sum of 120,000*l.* given to her by the will of her father John Williamson.

¹ See *Miller v. Huddleston*, L. R. 6 Eq. 65.

The original bill was filed by John Gillyatt Booth and George Booth, the latter being a lunatic, by J. G. Booth, his committee, against the Rev. John Alington, the surviving executor of John Williamson, for the payment of one-third part of 90,000*l.*, being the supposed remainder of a sum of 120,000*l.* bequeathed by the will of John Williamson to his daughter Elizabeth the wife of John Gillyatt Booth during her life, with power of appointing that sum in the event of her predeceasing her husband.

Mrs. Elizabeth Booth duly appointed 30,000*l.* in favour of her husband John Gillyatt Booth, and he being indebted to the testator in a sum of 60,000*l.* assigned the appointed money to the executor of the testator.

By the decree made on the hearing of the cause, the Master was among other things directed to inquire whether Elizabeth Booth had executed any and what *appointments or appointment of the sum of 120,000*l.*, or of any and what part thereof under the power given her by the will of John Williamson.

The Master by his report found that John Williamson by his will bearing date the 21st January, 1827, after leaving to his daughter Elizabeth, who was married to John Gillyatt Booth, the sum of 120,000*l.* for her separate use during the joint lives of herself and her husband, had in his will made a provision to the following effect: "But in case my said daughter shall happen to die in the lifetime of the said John Booth, her husband, then, from, and immediately after her decease upon trust that they, the said William Alington and John Alington, and the survivor of them, and the executors and administrators of such survivor, do and shall pay, assign, and divide the said principal sum of 120,000*l.*, and the funds and securities upon which the same shall be invested, unto such person or persons and for such intents and purposes and in such manner as my said daughter shall, notwithstanding her coverture, in or by any deed or writing, with or without power of revocation and new appointment, to be by her sealed and delivered in the presence of and attested by one or more credible witness or witnesses, or by her last will and testament in writing, or by any writing purporting to be in the nature of her last will and testament, or any codicil thereto to be executed by her in the presence of and attested by two or more witnesses, direct or appoint, and in default of such direction and appointment, and sub-

ject to any such as shall be partial and not a complete disposition of the whole of the said trust money, then upon trust to pay, assign, and divide the said principal sum of 120,000*l.*, or so much thereof as shall not have been appointed, and the stocks, funds, and securities upon which the same shall be invested unto and equally between all the children of * my said daughter, * 615 if more than one, as joint tenants, and if but one then to one such child. But if there should not be any child of my said daughter, then in trust for my daughter Mary," &c.

The Master also found that by a deed-poll bearing date the 29th January, 1833, Elizabeth Booth had appointed the sum of 30,000*l.* in favour of her husband, and the provisions of that deed so far as they are material are the following: " And whereas the said Elizabeth Booth is desirous that, in the event of her dying in the lifetime of her husband John Gillyatt Booth, the sum of 30,000*l.*, part of the said sum of 120,000*l.* by the said will of the said John Williamson given and bequeathed and provided for the benefit of her, the said Elizabeth Booth, as aforesaid, may immediately after her decease be paid to the said John Gillyatt Booth as a permanent and certain provision for him and for his own use and benefit, and with that view she hath proposed to exercise the power of appointment by the said will of the said John Williamson given to and vested in her partially, but completely and finally, and so far only as concerns or relates to the said sum of 30,000*l.*, part of the said sum of 120,000*l.*, in favour of the said John Gillyatt Booth in the manner hereinafter mentioned: Now therefore know ye, and these presents witness, that, in pursuance and performance of the desire and proposal of the said Elizabeth Booth as hereinafter expressed, and for carrying the same into effect, and for and in consideration of the love and affection which she hath and beareth for and towards the said John Gillyatt Booth her husband, and for settling and securing some certain and permanent provision for his benefit from and after her decease, in the event of her dying in his lifetime, she, the said Elizabeth Booth, wife of the said John Gillyatt Booth, in pursuance and by force and virtue of the power and authority to her for * that purpose given, limited, or * 616 reserved by and contained in the hereinafter recited will of her said father, the said John Williamson, as aforesaid, and of all and every other power and powers, authority and authorities whatsoever, to her at any other time or times or in any other manner

given, limited, or reserved, or belonging to or vested in or enabling her in this behalf in any wise howsoever, and in exercise and execution of the same partially, but completely and finally, and so far only as concerns or relates to the said sum of 30,000*l.*, part of the said sum of 120,000*l.*, and without prejudice to the exercise and execution of any power or authority now vested in her, the said Elizabeth Booth, to direct and appoint the residue of the said sum of 120,000*l.*, doth by this present deed or writing, by her sealed and delivered in the presence of and attested by the credible person or persons whose name or names is or are intended to be hereupon indorsed as a witness or witnesses to the execution hereof by her, absolutely and irrevocably direct and appoint the sum of 30,000*l.* of lawful money of Great Britain, part of the said sum of 120,000*l.*, so by the said will of the said John Williamson given and bequeathed for the use and benefit and to be at the absolute disposal of the said Elizabeth Booth as hereinbefore is mentioned, of the stock, funds, and securities in or upon which the said sum of 30,000*l.* shall for the time being be laid out or invested unto, and to be paid or assigned, transferred, and made over, unto the said John Gillyatt Booth, his executors, administrators, or assigns from and immediately after the decease of the said Elizabeth Booth, in case she shall happen to die in the lifetime of the said John Gillyatt Booth, her husband, absolutely to and for the proper use and benefit of the said John Gillyatt Booth, his executors, administrators, or assigns, or otherwise as he or they shall direct or appoint, and to or for no other intent or purpose and in no other manner whatsoever."

* 617 * The defendant, the Reverend John Alington, was the sole surviving executor of the will of John Williamson, and he had taken from John Gillyatt Booth (who was indebted to the estate of John Williamson to the amount of 60,000*l.*) an assignment of the 30,000*l.*

The estate of John Williamson turned out insufficient to pay the whole legacy of 120,000*l.* in full, and the plaintiff, George Booth the lunatic, excepted to the Master's report, which in effect declared that John Gillyatt Booth was entitled to the whole of the 30,000*l.* as a certain and specific sum irrespective of the amount that the estate might produce. The plaintiff contended that John Gillyatt Booth only took this sum as an aliquot part of the 120,000*l.*, and that on the estate turning out insufficient to pay the whole

legacy in full, it was liable to abate ratably with the other proportions left by the will, and that, the appointment being made under the will, John Gillyatt Booth was consequently in the same position as any other person taking directly under the will. Since the death of John Gillyatt Booth, John Booth, the brother of the lunatic, was appointed his committee.

The exception came on to be heard before the Vice-Chancellor STUART on the 16th April, 1856, when his Honor allowed the exception and made a declaration that the 30,000*l.* was not to be paid at all events, but ratably out of the 120,000*l.* From that decision the defendant D. T. Coulton, the executor of John Gillyatt Booth, now appealed to the Lord Chancellor.

Mr. Bacon and *Mr. Hardy*, for the appellant. — The only ground on which the Vice-Chancellor held that the specific sum of 30,000*l.* appointed ought to abate was * that the appoint- * 618 ment contained the words “part of,” but we submit that those words are only descriptive of the fund on which the appointment was to operate. It is well established that where there has been an appointment of an aliquot part of a settled sum, and the fund sustains a loss, the loss must be borne wholly by the persons entitled to the residue. *Oke v. Heath*, (a) *Shelley v. Earsfield*, (b) *Humphreys v. Humphreys*, (c) *Burrow v. Close*, (d) 2 Sugd. Powers, p. 24 (ed. 6). It is clear that the part appointed would not have been increased if the fund had been augmented, and there is no reason why it should be influenced by a depreciation. In the case of *Rawlins v. McMahon*, before your Lordship as Vice-Chancellor in August, 1851, but not reported, there was a power of appointment over a sum of 12,000*l.* among children of whom there were seven, and the donee of the power having appointed 1715*l.* to one of the children and the fund ultimately only realizing little more than 3000*l.* it was held by your Lordship that the appointee was entitled to be paid her appointed sum in full, though there could be no doubt but that the appointment was intended as and for the one-seventh share of the 12,000*l.*

Mr. Malins and *Mr. Shebbeare*, for the plaintiff, in support of the Vice-Chancellor's decision. — Under the will of the testator all

(a) 1 Ves. 135; see p. 142.

(c) 2 Cox, 184.

(b) 1 Rep. in C. 110.

(d) 11 Ir. 391.

the children of Mrs. Booth took vested interests in default of appointment, and the power if exercised could only take effect as a testamentary instrument, and looking at it as such it must be read as if made by the will of the author of the power, and all persons taking under it must abate proportionally. Unless
 * 619 * a contrary intention is apparent on the will, it must be presumed that a testator considers that he has property sufficient to answer all his legacies, and that he has an equal intention that all his legatees should be equally paid, and in case of a deficiency of assets all must abate equally. *Beeston v. Booth*, (a) *Page v. Leapingwell*. (b) We submit that the 30,000*l.* was no more appointed than the residue was unappointed. Mrs. Booth used the expression "part of" as equivalent to and in the sense of "being one-fourth part of," and under such circumstances there can be no doubt as to the correctness of the Vice-Chancellor's construction. The case of *Rawlins v. McMahon* was decided without argument, having been heard as a short cause on the eve of the long vacation.

Mr. Craig, *Mr. Selwyn*, and *Mr. E. Hawkins*, for the defendant the Rev. John Alington, supported the decree.

Mr. Elmsley and *Mr. Mackeson*, for J. P. Booth, another brother of the plaintiff's.

Mr. Hardy, in reply, cited *Petre v. Petre* (c) and *Vivian v. Mortlock*. (d)

At the conclusion of the argument the Lord Chancellor said he would not then finally dispose of the appeal without further consideration, but intimated his opinion that the case was not governed by that of *Page v. Leapingwell*, (b) inasmuch as the words used by the donee of the power in the present instance did not appear to him to be tantamount to an appointment of an
 * 620 * aliquot portion of a fund, but indicated rather the appointment of a definite sum.

(a) 4 Mad. 161.

(b) 18 Ves. 463.

(c) 14 Beav. 196.

(d) 21 Beav. 252.

December 5.

THE LORD CHANCELLOR. — The main question depends upon the true construction of the deed of appointment; namely, whether Mrs. Booth has thereby appointed the sum of 30,000*l.* absolutely, or whether she only intended to appoint one-fourth part of the sum of 120,000*l.* I expressed my opinion yesterday on this point to the effect that the former was the true construction, and having since considered the matter carefully, I have arrived at the conclusion that that opinion which I at first formed is perfectly correct. I think the appointrix, Mrs. Booth, meant to give not an aliquot part of what she had power to appoint, but an absolute sum of 30,000*l.*, and that when she used the expression “part of” she merely meant to designate the fund out of which the 30,000*l.* was to be paid. If I were to indulge in speculation as to the intention of Mrs. Booth, I might possibly arrive at the right solution, or I might fail. It is just one of those cases in which it is the duty of the Court to extricate the meaning from the language, and the words used imply as plainly as language can speak that the appointee is to take 30,000*l.*

The only point which at first presented any difficulty to my mind was the clause in the appointment which speaks of “the stocks, funds, and securities in or upon which the said sum of 30,000*l.* should for the time being be laid out or invested,” but I think that Mr. Hardy’s observation is correct, that it referred only to the stocks, funds, and securities in which the 30,000*l.* might happen * to be invested at the time when it became * 621 payable. The provision is superfluous, and would have been implied if it had not been inserted. With all deference therefore to the Vice-Chancellor, though with the hesitation which I always feel when I differ from the opinion of so learned a Judge, I think Mrs. Booth meant to appoint an absolute sum of 30,000*l.* I need not speculate upon what I might have thought if she had gone on to say, “I appoint the residue to my children.” She, however, makes no appointment of the residue, which therefore goes in accordance with the direction contained in the will of her father. The decree of the Vice-Chancellor must therefore be varied in conformity with the opinion I have expressed.

With respect to the manuscript case of *Rawlins v. McMahon*, which was referred to, I may observe that I have since looked at my notes of that case; it was not heard as a short cause. The

case of *Chambers v. Chambers* (a) was then cited, though it has not been cited in the argument of the present case. I can hardly say that I quite coincide with Lord KING in his judgment in *Chambers v. Chambers*: (a) it was decided at the time of the South Sea bubble, when there were some strange decisions. There a father on the marriage of his son covenanted to lay out 6000*l.* in a purchase of lands to be settled in strict settlement, charged with 2000*l.* for the portions of younger children or 8000*l.* for daughters if there were no sons, and further covenanted to settle his own estate on his son and the heirs male of his body. The money by being subscribed into the South Sea Company was reduced to 3000*l.*, and Lord KING decided that the eldest son was not to bear the loss, but that the younger children were to abate in proportion.

* 622 * I am not satisfied that I should have come to the same conclusion, but the principle of that decision does not influence the present question at all, because Lord KING's decision rested on the ground that the case fell within the principle of *Page v. Leapingwell*, (b) and he understood the covenant to mean that a particular sum was to be invested in a particular manner, and that, there being a fund so invested, two-thirds of it should belong to the eldest son and his issue, and one-third to the other children. But supposing that case to be good law, still it is not applicable to the question before me; and as at present advised, I see no reason to doubt that my decision in *Rawlins v. McMahon* is correct. That decision rested upon the same ground as that on which my judgment is now founded. If a person having power to appoint a fund gives a particular sum, and describes it as "part of" that fund, what right has the Court to say he did not mean to give that particular sum? It is always the safest way in all such cases to adhere to the exact language, if you can possibly do so; any other interpretation must be founded on mere conjecture.

(a) *Moseley*, 333.

(b) 18 *Ves.* 465.

* HESSE v. BRIANT.

* 628

1856. December 6, 8. Before the Lord Chancellor Lord CRANWORTH.

H. and B. were clients of the same solicitor, M., to whom B. gave an authority in writing to sell certain property. Acting on this authority, M. entered into an agreement with H. to sell the property to him: *Held*, that this was a transaction in which there was a necessity for the utmost openness of dealing, and the Court, not being satisfied that this existed in the case before it, refused specific performance of the agreement entered into.¹

THE question in this case was whether the plaintiff, the Rev. James Legrew Hesse, was entitled to enforce against the defendant, Frederick Caleb Briant, the specific performance of an agreement by the latter to sell certain premises forming the subject of the contract. Vice-Chancellor STUART, before whom the case came in June, 1856, made a decree in the plaintiff's favour, and the defendant now appealed. The following are the material facts of the case.

The plaintiff and defendant were both clients of the same solicitor, Mr. Mellersh; and the statement in the bill was, that on the 6th June, 1853, the defendant gave Mr. Mellersh authority to sell to the plaintiff the premises in question, and that under this authority Mr. Mellersh on the 10th June, 1853, entered into the agreement with the plaintiff which it was the object of the suit to enforce. The fact, that such an authority to sell was given, was not denied by the defendant, but he alleged that at the time of entering into the agreement he was completely under the control of Mr. Mellersh, and he insisted that the position in which Mr. Mellersh stood towards both parties vitiated the contract, and that under the circumstances of the case it could not be enforced. There was a great deal of conflicting evidence, much of it being directed to the question whether there had not been fraud and misconduct on the part of Mr. Mellersh in reference to the contract generally. The mode, however, in which the Lord Chancellor disposed of the case renders it necessary, in addition to the other circumstances

¹ See Sugden V. & P. (14th Eng. ed.) 690; *In re Bloye's Trusts*, 1 Mac. & G. 488, and cases in notes; *Ex parte Bennett*, 10 Ves. (Sumner's ed.) 381, and cases cited in notes by Perkins; *Savery v. King*, 5 H. L. Cas. 627.

* 624 * alluded to by his Lordship, to refer only to the principal point; namely, the circumstances which led to and attended the giving of the authority by the defendant, and in consequence of which the contract was formally entered into. As to these the representations made by the plaintiff and defendant respectively were in substance as follows.

The plaintiff alleged that on the morning of the 6th June, 1853, the defendant came to the office of Mr. Mellersh at Godalming, when a long consultation took place between him and Mr. Mellersh on the subject of the propriety of selling to the plaintiff a certain part of the property about which there had been some negotiation between the plaintiff and the defendant as far back as the year 1848, when an estimate of the rental and value had been made and reduced into writing by Mr. Johnson, the managing clerk of Mr. Mellersh; that the defendant, after referring to the estimate of 1848, and maturely considering the subject, came to a determination in the presence of Mr. Mellersh and Mr. Johnson to sell that part of the property for 600*l.*, and accordingly Mr. Johnson, under the instructions of the defendant, wrote out that part of the authority which related thereto; that when this had been done, the defendant and Mr. Mellersh directed their attention to another part of the property, and it was suggested (but whether in the first instance by Mr. Mellersh, or the defendant, the plaintiff was unable to set forth) and ultimately determined upon by the defendant that the offer of sale of the first-mentioned part of the property to the plaintiff should be coupled with an offer to sell him the other part for 500*l.*; that at about this stage of the interview the plaintiff called at Mr. Mellersh's office upon other business, and when he was announced to Mr. Mellersh the defendant and Mr.

* 625 Johnson retired into another room before the * plaintiff entered Mr. Mellersh's room, and that Mr. Mellersh on the plaintiff entering his room offered both properties to him for 1125*l.*; that the plaintiff upon the price being mentioned was rather surprised at its amount, but said he would consider of it, and as he was going on to Guildford would return in the evening and give Mr. Mellersh an answer, and the plaintiff then left the office; that at this time the plaintiff did not know that the defendant was with Mr. Johnson in another room; that immediately after the plaintiff had left, Mr. Mellersh communicated to the defendant what had taken place between himself and the plaintiff, whereupon

Mr. Johnson, acting under the instructions of the defendant, added to the authority that part which related to the second portion of the property, and the defendant then signed the authority, but particularly requested that it should not be known or mentioned; that in the evening the plaintiff returned to the office of Mr. Mellersh, and agreed with Mr. Mellersh to give the sum asked by him, namely, 1125*l*.

The statement of the defendant in reference to the same matter was, — that he was at Mr. Mellersh's office on the 6th June, 1853, and that on that occasion Mr. Mellersh advised and recommended him to sell the property in question, but that he did not state that the plaintiff was desirous of purchasing, though he the defendant was aware from a previous conversation that the plaintiff wished to be a purchaser; that he the defendant did not see the plaintiff on the 6th June, though he had since been informed that the plaintiff was at Mr. Mellersh's house while he the defendant was there; that in consequence of the advice and recommendation of Mr. Mellersh, an authority was prepared which he, the defendant, signed and left with Mr. Mellersh; that he did not at the time of signing the authority know or * suspect that Mr. * 626 Mellersh was the solicitor of the plaintiff; that Mr. Mellersh suppressed and kept secret from him until the 7th October, 1854, the contract entered into with the plaintiff; that Mr. Mellersh did not on the 6th June, 1853, communicate to him any thing that had taken place between him, Mr. Mellersh, and the plaintiff, and did not tell him or lead him to believe that he had had an interview with the plaintiff on that day, or that he was acting or in any wise authorized to act on behalf of the plaintiff; that he, the defendant, did not give instructions for the preparation of the authority, and that any instructions that were given were given by Mr. Mellersh; that he did not request that the documents signed by him should not be known or mentioned, but that Mr. Mellersh advised him not to speak of what he had done.

It may be here mentioned that the Vice-Chancellor, in making the decree appealed from, expressed his opinion that the evidence as to unfairness amounted to little or nothing that seemed important to his Honor's mind, and as to the rule, which it was said would not permit a person in a confidential relation to abuse it by acting on behalf of both parties, his Honor was of opinion that he could only consider what was done by the plaintiff with regard to

the contract as done by himself on his own judgment, that there were none of the circumstances to introduce into the transaction the confidential relation in the matter of the contract, that it was the plaintiff's contract influenced only by his own judgment and not influenced at all by Mr. Mellersh. His Honor then added, "If there had been upon either part of the case even a doubtful case as to the fairness of the transaction, or if the case had been one in which there was a reasonable colour for treating Mr. Mellersh as acting on behalf of Mr. Hesse in the matter of the contract, the jurisdiction in specific performance being a * 627 discretionary one, it * would, I think, have been the duty of the Court to have refused its assistance to the performance of this contract, and to have left the plaintiff and the defendant reciprocally to any remedies they might have at law; but in my opinion the case is one in which on both grounds the defence so entirely fails, that I cannot satisfy my mind that I should be justified in treating the contract as an invalid contract, or otherwise than as a binding contract so as to enforce it by the decree of the Court."

Mr. Bacon, with whom was *Mr. H. Stevens*, for the plaintiff, supported the decree of the Vice-Chancellor.

Mr. Malins, with whom was *Mr. G. M. Giffard*, for the appellant. — He submitted that it was unnecessary to establish any case of direct fraud: it was enough to show that the contract was entered into under circumstances which proved that the defendant was not adequately protected, and it was clear that Mr. Mellersh was in a position in which he could not properly protect the interests of both parties. He insisted that on grounds of public policy the contract ought not to be enforced. Mr. Mellersh had placed himself in a situation in which his interest and duty conflicted, and this the Court would not permit: his conduct also had not been straightforward; he ought on the 6th June to have let the parties meet. He cited *Ex parte James*, (a) *Ex parte Bennett*, (b) *In re Bloye's Trust*. (c)

Mr. Bacon replied. — He insisted that there was no * 628 positive rule against a * solicitor acting for both parties in

(a) 8 Ves. 337.

(b) 10 Ves. 381.

(c) 1 Mac. & G. 488.

a case of this kind ; and that in the present instance every thing had been fairly and properly done.

THE LORD CHANCELLOR. — The law applicable to cases of this nature has been well settled for upwards of half a century : the simple question is, what are the obligations imposed on a person who deals for his own benefit, or as the agent of another with the property of one to whom he stands in a fiduciary character ? I quite agree with what fell on this subject from Lord ELDON in *Ex parte Bennett*, where, alluding to the facts of that case, he says : (a) “ Upon the general rule both the solicitor and the commissioner have duties imposed upon them that prevent their buying for themselves, and if that is the general rule it follows of necessity that neither of them can be permitted to buy for a third person, for the Court can with as little effect examine whether that was done by making an undue use of the information received in the course of their duty in the one case as in the other.” The principle to be deduced from the decided cases is, that there must be entire good faith, and in the instance of a solicitor it is incumbent upon him to satisfy the Court that he has done as much for his client as he would have done if the purchaser had been a third person. I think this principle applies to almost all cases, and applying it to the one before me I do not come to the same conclusion as that arrived at by the Vice-Chancellor.

The first question is, was Mr. Mellersh acting as the solicitor for both parties ? I think that he was, but if I had any doubt on the subject, it would be as to whether * he was * 629 acting for Mr. Briant. It is quite clear that he was all along acting as the professional adviser of Mr. Hesse, who had consulted him on the matter of this purchase, as appears by the items in his bill of costs which is in evidence. He must also be taken to have been acting for Mr. Briant. Such being the case, there was a necessity for the most perfect good faith and openness of dealing. Was there, however, this openness and good faith ? In my opinion there was not. It appears that on Friday, the 3d June, Mr. Mellersh had an interview with Mr. Briant : on the next day he wrote to Mr. Hesse telling him that the property was for sale ; and having previously appointed Mr. Briant to be with him

(a) 10 Ves. 400.

on Monday the 6th, he writes to Mr. Hesse and desires him to come on that day in order to treat. Now I don't find that this was ever communicated to Mr. Briant, though it was very important to a man in the defendant's position to know who was likely to become the purchaser, as if he had known that Mr. Hesse was the person, he might have insisted upon his giving a higher price. If then that was not communicated, it would in my opinion upset the whole transaction, because any fact which ought to have been made known, and which was not communicated, would be enough for that purpose. The plaintiff came to Mr. Mellersh's office accordingly, and had an immediate offer of the property made to him, which he accepted. There is considerable complication in the evidence as to whether the defendant, who was at the office at the time, was made acquainted with this fact, and knew who was the purchaser. The more direct testimony is, that Mr. Hesse's name was not mentioned to Mr. Briant, and that Mr. Briant did not know that he was there. I think it very unlikely that any express authority had been then given by the defendant to sell to

the plaintiff, judging from the language of the letter in which
* 630 Mr. Mellersh subsequently communicated the fact * of the sale to the defendant, and in which he does not mention the name of the purchaser.

The circumstances show conclusively to my mind that there was not that fair, open dealing between the parties which the relation in which they stood to each other demanded. Although, therefore, I do not lay it down that an agent cannot act for and bind opposing parties, yet it must appear that the principals were at arms' length in the transaction; and it would require a very strong case to make this out where, as in the present instance, a vendor and purchaser are together in the same house, but the vendor is excluded from the room where the negotiation is going on, and the agent does not disclose to them both the whole nature of the dealing. Mr. Briant having intrusted to Mr. Mellersh the conduct of the sale, it seems to me quite impossible to sanction such a proceeding as that which took place. The case is not, in my opinion, one in which relief ought to have been granted, but one in which the bill ought to have been dismissed with costs.

* SMITH v. SPENCER.

* 631

1856. December 9, 10, 11. Before the Lord Chancellor Lord CRANWORTH.

A testatrix devised to trustees certain freehold premises in trust to receive the rents, and, after paying thereout all proper outgoings and applying thereout if they thought fit any money towards the maintenance of F. S., to let the residue accumulate until F. S. should attain twenty-one, and then to pay such accumulations to him, but if he should die under such age without leaving issue living at his decease, then such accumulations should be applied for the benefit of the person to whom and in the like manner and form as the premises were limited in the like event, and when F. S. should have attained twenty-one then the trustees were to stand seised of the premises in trust for him in fee, but if he should not leave any issue living at his decease then the trustees should stand seised of the premises in trust for A. S. in fee, and if A. S. should not leave any issue living at her decease then over. F. S. attained twenty-one, and died without ever having had issue: *Held*, on the construction of the will, that the premises vested in F. S. in fee on his attaining twenty-one, subject to be divested in the event of his dying without issue, which event having happened the limitation over in favour of A. S. took effect.

THIS was an appeal from a decision of Vice-Chancellor STUART upon questions of construction arising on the will of Esther Houldin, and to determine which a special case was submitted for the opinion of the Court under the Act 13 & 14 Vict. c. 35.

The case stated that E. Houldin by her will, dated the 24th December, 1829, gave and devised as follows: "I give and devise unto and to the use of John Bott and John Hopkins and their heirs all my freehold messuages or tenements, malt-houses, buildings, land, and appurtenances situate in Warwick Street, Bordesley, near Birmingham aforesaid, upon trust that the said John Bott and John Hopkins and the survivor of them, and his heirs or their or his assigns, shall receive the yearly rents of the said premises, and after paying thereout all proper outgoings for repairs or otherwise, and applying thereout, if they or he shall think fit so to do, any money in or towards the maintenance, education, or other benefit of Frederick Samuel Spencer, son of my late niece Esther Spencer, shall let the residue of such rents accumulate from my decease until he shall attain his full age of

* twenty-one years, and then shall pay such accumulations * 632

to him ; but if he shall die under such age, and not leave any child, children, or issue living at his decease, or, then leaving such, if all such children or issue then living should afterwards die under the age of twenty-one years, and without issue living at his, her, or their death or respective deaths, then such accumulations, if any, shall be applied for the benefit of the like other person or persons and in like manner and form as in the like event such Warwick Street premises are limited in this my will, and when the said Frederick Samuel Spencer shall have attained his age of twenty-one years, then shall stand seised of the said Warwick Street premises upon trust for him, his heirs and assigns for ever. But if he should not leave any child, children, or issue living at his decease, or, then leaving such, if all such child, children, or issue then living should afterwards die under the age of twenty-one years, and without any issue living at his, her, or their death or respective deaths, then such trustees or trustee shall from thenceforth stand seised of the said Warwick Street premises upon trust for my niece Ann Smith, her heirs and assigns for ever. And if the said Ann Smith should not leave any child, children, or issue living at her decease, or, then leaving such, if all such child, children, or issue then living should afterwards die under the age of twenty-one years, and without leaving any issue living at his, her, or their death or respective deaths, then such trustees or trustee shall from thenceforth stand seised of the said Warwick Street premises upon trust for my relations George Groves, Rose Hannah Groves, and Lydia Groves in equal shares as tenants in common, and for their respective heirs and assigns for ever."

The case then stated that the testatrix died on the 7th January, 1830 ; that Frederick Samuel Spencer attained twenty-one * 633 in 1845, and died on the 3d March, 1855, * without ever having had issue, leaving the defendant John Spencer (the only son of his father's only brother William Spencer) his first cousin and heir-at-law him surviving ; that Ann Smith intermarried with the plaintiff William Smith ; that Lydia Groves on the 9th June, 1835, intermarried with the defendant Charles Hadduck ; that the plaintiff Ann Smith and the defendant Lydia Hadduck respectively concurred in the case in their own right.

The case then stated that the following questions had arisen between the persons claiming to be interested under the will of Esther Houldin as to the construction of the said will: First,

whether the plaintiff Ann Smith took upon the decease of Frederick Samuel Spencer without leaving issue living at his death an equitable estate in fee-simple in the Warwick Street premises defeasible in the event of her dying without issue living at her decease, or what other estate if any in the said premises the plaintiff Ann Smith took under the will ; or, secondly, whether Frederick Samuel Spencer upon attaining his age of twenty-one years acquired an absolute indefeasible equitable estate in fee-simple in the Warwick Street premises.

The matter came on before Vice-Chancellor STUART on the 11th July, 1856, when his Honor made an order, declaring that Frederick Samuel Spencer having attained the age of twenty-one years and having died without leaving issue living at his decease, the limitation over in favour of Ann Smith took effect.

The defendant John Spencer, the heir-at-law of F. S. Spencer, appealed from this order, on the ground that the declaration ought to have been that F. S. Spencer upon attaining twenty-one acquired an absolute indefeasible * equitable * 634 estate in fee-simple in the Warwick Street premises. The appeal now came on for hearing accordingly.

Mr. Selwyn and *Mr. T. Terrell*, for the appellant. — They contended that it was clear that the gift of the accumulations of the rents was absolute in the event of F. S. Spencer attaining twenty-one, and submitted that the same event was to be taken as regulating the vesting of the *corpus* of the estate, and that F. S. Spencer having attained twenty-one, the fact of his dying without issue could make no difference, the gift over being only to take effect in the like event as that which applied to the accumulations, the interest in which had clearly become absolute. They insisted that the general rule of construction in cases like the present was, that where a particular time was fixed for the happening of a contingency, and there was a defeasance, the defeasance would have reference only to the happening of the event within the period fixed. They referred to *Edwards v. Edwards*, (a) *Brotherton v. Bury*, (b) *Da Costa v. Keir*, (c) *Home v. Pillans*. (d)

The Lord Chancellor (without calling upon the respondent)

(a) 15 Beav. 357.

(c) 3 Russ. 360.

(b) 18 Beav. 65.

(d) 2 Myl. & K. 15.

said, — he thought that the Vice-Chancellor was perfectly right, and without expressing any opinion on the rule of construction which had been relied upon, the rule must give way to the express words in this will, which in his opinion were conclusive against the contention of the appellant: he should therefore dismiss the appeal and say nothing about the costs.

* 635 * The Lord Chancellor mentioned the case on the following day (December 10), and stated that having disposed of it without hearing both sides he would prefer that it should be regularly argued, and it might therefore come again into the paper as a part-heard appeal.

December 11.

Mr. Craig and *Mr. Springall Thompson*, for the plaintiff *A. Smith*, supported the decision of the Vice-Chancellor. — They noticed the argument of the other side and relied on the words of the will; they distinguished the present case from *Home v. Pillans*, (a) and likened it to *Boraston's Case* (b) and *Goodtitle v. Whitby*. (c)

[The Lord Chancellor mentioned *Ackers v. Phipps*. (d)]

Mr. A. Boyd Purcell appeared for *L. Hadduck*, whose interest was similar to that of the plaintiff. — He commented on *Beachcroft v. Broome* (e) and *Glover v. Monckton*. (g)

Mr. Selwyn replied, and relied on *Edwards v. Edwards*. (h)

The cases of *Doe v. Lea* (i) and *Manfield v. Dugard* (k) were also mentioned and commented on in the course of the argument.

* 636 * The Lord Chancellor said he was glad that the case had been fully argued, though the result was that he had come to the same conclusion at which he had formerly arrived.

His Lordship, after noticing that cases like the present generally

(a) 2 Myl. & K. 15.

(b) 3 Rep. 19.

(c) 1 Burr. 228.

(d) 9 Bli. 430; 9 Cl. & Fin. 583.

(e) 4 T. R. 441.

(g) 3 Bing. 13.

(h) 15 Beav. 357.

(i) 3 T. R. 41.

(k) 1 Eq. Ca. Abr. 195.

depended each on its own particular circumstances, went into a minute examination of the wording of the will, and stated his opinion to be that the gift to F. S. Spencer was not a contingent gift as in the case of *Home v. Pillans*, (a) but an absolute gift. On the death of the testatrix the property vested in F. S. Spencer on his attaining twenty-one as equitable tenant in fee, subject to be divested in the event of his dying without issue, which event had happened. The appeal must therefore be dismissed, but without costs.

His Lordship subsequently handed to the reporters the following, in reference to a portion of the appellant's argument of which no particular notice was taken in the judgment.

“The argument of the appellant deduced from the clause as to the disposition of the accumulated rents in the event of F. S. Spencer dying under twenty-one without issue living at his decease, is evidently founded on a fallacy. The trustees are directed to stand seised of the *corpus* of the estate in trust for F. S. Spencer and his heirs, but with an executory devise over in case he should die without issue living at his death, that is, in case he should so die either under twenty-one or not under twenty-one.

* “The clause as to the accumulated rents provides that * 637 they shall, in case F. S. Spencer should die under twenty-one and without issue living at his decease, go to the persons who on that event, that is, his death under twenty-one without issue, would take the *corpus*; but that is one of the events on which the executory devise over is to take effect; therefore the accumulated rents must then go to the executory devisee of the *corpus*. It does not, however, follow that, because in such a case the *corpus* and the rents go together, therefore the *corpus* is never to go over unless when the accumulated rents are to go in the same channel; these are to go over only when F. S. Spencer dies under twenty-one without issue living at his decease; the *corpus* is to go over at whatever age he dies, provided only he leaves no issue living at his decease. I have said, dies without issue living at his decease; I am aware that the provision extends also to the case of his leaving issue but such issue dying under twenty-one. This, however, makes no difference in principle.”

(a) 2 Myl. & K. 15.

* 638 * OTTER v. LORD VAUX AND OTHERS.

1856. December 19. Before the Lord Chancellor Lord CRANWORTH.

A mortgagor, having made two successive mortgages of his estate to different persons, purchased the estate from the first mortgagee selling under a power of sale contained in his mortgage: the purchase-money was not sufficient to pay off the first mortgage: *Held*, that the mortgagor could not by this purchase defeat the title of the second mortgagee.¹

Whether this would be the case if the estate had been sold to a stranger and subsequently purchased from such stranger by the mortgagor, *quære*.

THE bill in this suit was filed by Charles Otter, claiming under a transfer from W. F. Geach of a second mortgage on a certain freehold estate called the Bedwas estate in Monmouthshire, and it prayed the usual account, and the payment of what should be found due on the security, and in default that the defendants might be foreclosed. The first defendants on the record were Lord Vaux and J. C. Mostyn, the executors of H. Mostyn, who was an equitable mortgagee of the premises under a deposit of deeds made subsequently to a purchase of the estate by W. Llewellyn, the party entitled to the equity of redemption from H. Goude, the first mortgagee, selling under a power of sale contained in his security; the other defendants were the said W. Llewellyn, the representatives of W. Williams, a mortgagee ranking third at the time of the sale, and Mary Llewellyn, a mortgagee under a deed executed subsequently to the sale and expressly made subject to the charge of the first defendants. The plaintiff claimed under the circumstances to have become first mortgagee on the estate; the executors of H. Mostyn and M. Llewellyn, on the other hand, claimed to have priority over the plaintiff, on the ground that W. Llewellyn had by means of his purchase acquired a new title to the estate. Vice-Chancellor WOOD, before whom the case originally came, made a decree dated the 19th June, 1856, in favour of the plaintiff, and from this decree the defendant Mary Llewellyn now appealed. The following were the facts giving rise to the question.

* 639 * By indentures of lease and release, dated the 13th and

¹ See Sugden V. & P. (14th Eng. ed.) 66, 748; Lewin Trusts (5th Eng. ed.), 518, 519.

14th October, 1837, the Bedwas estate, which was then vested in Jane Llewellyn, widow, for life, with remainder in fee to her son the defendant William Llewellyn, was, together with other estates (all the property of Llewellyn Llewellyn deceased, the late husband of Jane Llewellyn and father of William Llewellyn) conveyed to Henry Goude by way of mortgage to secure 4000*l.* and interest; and Jane Llewellyn and William Llewellyn covenanted with Henry Goude to pay the mortgage money and interest, and for title in the usual way; and the deed contained a power of sale to be exercised by Henry Goude in default of payment.

By indentures of lease and release, dated the 12th and 13th days of January, 1838, after reciting the making of the mortgage to H. Goude, Jane Llewellyn and William Llewellyn concurred in conveying the same estates to W. F. Geach in fee "subject to the said mortgage for 4000*l.* to the said Henry Goude" by way of mortgage to secure 1520*l.* and interest; and the mortgage contained covenants by J. Llewellyn and W. Llewellyn to pay the 1520*l.* and interest and for title including a covenant for further assurance of the mortgaged premises "subject as aforesaid" to W. F. Geach in fee by Jane Llewellyn and William Llewellyn and their heirs and "all other persons whosoever having or lawfully or equitably claiming or who shall or may have or lawfully or equitably claim any estate, right, title, or interest in or to the said hereditaments."

A memorandum of this second mortgage was indorsed upon the first mortgage-deed.

By indenture dated the 15th January, 1838, the Bedwas estate was further mortgaged to W. Williams to secure * 450*l.* * 640 and interest, and a memorandum of this mortgage was indorsed on the indenture of the 14th October, 1837.

By indenture dated the 6th July, 1838, W. F. Geach assigned his mortgage security to the plaintiff in the present suit.

On the 28th January, 1840, H. Goude, acting on the power of sale contained in his mortgage-deed, put up the Bedwas estate for sale by public auction, but it was bought in. About a fortnight afterwards, and acting under the same power, he contracted to sell the estate to one John Davies for 1150*l.* J. Davies afterwards agreed to give up his interest in the contract in favour of W. Llewellyn for 5*l.*, and signed a memorandum to that effect. In pursuance of this agreement W. Llewellyn paid the 1150*l.*, and by indentures of lease and release, dated the 3d and 4th August,

1840, H. Goude conveyed the Bedwas estate to W. Llewellyn. It was distinctly denied that there was any previous understanding between J. Davies and W. Llewellyn, or that J. Davies had contracted to purchase otherwise than on his own account and as a *bonâ fide* purchaser.

H. Goude sold the rest of the property comprised in his mortgage to other persons; but it did not appear that the whole of the purchase-money received by him for all the property, including the Bedwas estate, exceeded the amount of his mortgage debt.

In May, 1844, William Llewellyn deposited the indentures of the 3d and 4th August, 1840, with H. Mostyn by way of equitable mortgage to secure 140*l.* and interest; and H. Mostyn having died in August, 1845, this mortgage became vested in the defendants

Lord Vaux and J. C. Mostyn, his executors. H. Mostyn * 641 had * been concerned as agent for H. Goude in the sale to W. Llewellyn, and had notice of the mortgages to W. F. Geach and W. Williams.

By indenture dated the 21st May, 1853, W. Llewellyn conveyed the Bedwas estate to Mary Llewellyn by way of mortgage to secure the payment of 1192*l.* 10*s.* and interest subject to the equitable mortgage of H. Mostyn. It was stated that the greater portion of this money had been borrowed by W. Llewellyn from Mary Llewellyn for the purpose of making the purchase of the estate from H. Goude. M. Llewellyn had notice of the mortgage to W. F. Geach.

A report of the case, as heard by the Vice-Chancellor, will be found in the second volume of Messrs. Kay and Johnson's Reports, p. 650.

Mr. James and *Mr. G. M. Giffard*, for the plaintiff, supported the decree. — The question is whether any dealing between the mortgagor and first mortgagee with the mortgaged property can cut down the security of the second mortgagee; in other words, whether a mortgagor who gets in a first mortgage can hold it against the second mortgagee. The cases of *Doe v. Pott*, (a) *Frazer v. Jones*, (b) *Smith v. Chichester*, (c) and *Persse v. Persse*, (d) show that a mortgagor cannot be allowed to set up any interest acquired by himself against his mortgagee. Applying this prin-

(a) 2 Douglass, 709.

(c) 1 Connor & Lawson, 486.

(b) 5 Hare, 475.

(d) Before the House of Lords, 1856; since reported, 5 H. L. Cas. 682.

ciple to the present case, the decree made by the Vice-Chancellor was clearly right. The case was in fact * governed by * 642 the decisions in *Toulmin v. Steere*, (a) *Parry v. Wright*, (b) and *Smith v. Phillips*. (c) The mortgagor was bound by his covenant for further assurance; the defendant also had notice of the plaintiff's title.

Mr. Amphlett and *Mr. C. Roupell*, for the appellant. — They drew attention to the fact that this was not the case of a purchase by the mortgagor from the mortgagee, the property having been bought by J. Davies and purchased from him by W. Llewellyn. The plaintiff's charge was on the equity of redemption, and that was destroyed by the exercise of the power of sale. They submitted that the estate acquired by W. Llewellyn as purchaser was an entirely new estate, and was not one which he was bound to convey under his covenant for further assurance: to hold the contrary would be to turn the covenant into one for further security. They commented on *Toulmin v. Steere* and the other authorities referred to by the plaintiff, insisting that the present case was distinguishable from them in its circumstances, and was not governed by them: they also referred to *Gregg v. Arrott* (d) and *Watts v. Symes* (e) as showing that the decision in *Toulmin v. Steere* was not approved of, and ought not to be followed.

THE LORD CHANCELLOR. — I will not trouble you, *Mr. James*, to reply, as I have no doubt upon this case. The general principle, that a mortgagor cannot set up against his own incumbrancer any other incumbrance created by himself, is a proposition * that I think has never been controverted. In *Toulmin v. Steere*, (a) and one or two other cases, I believe, that have * 643 followed it, that principle was carried to an extent which has been questioned; perhaps it is now considered as settled, but it was carried to an extent that might have admitted of an argument against it. In *Toulmin v. Steere* it was held that a prior incumbrancer of a mortgagor putting himself in the place of the mortgagor by purchasing the equity of redemption could not set up his own prior incumbrance against a subsequent incumbrancer; and this holding

(a) 3 Mer. 210.

(b) 5 Russ. 142.

(c) 1 Keen, 694.

(d) Lloyd & Gould, 246.

(e) 1 De G., M. & G. 240.

has been subsequently followed. Whether or not that was founded upon a correct application of the old rule, we need not now inquire; for that is not the present case, which is strictly the case of the original debtor, the original mortgagor, striving to set up a prior incumbrance created by himself against a subsequent incumbrance also created by himself. This is the case, unless there is a distinction from the circumstance that the title of the mortgagor arose under the power of sale of the first incumbrancer. I confess that I agree with the Vice-Chancellor Wood, and think that to make any distinction on that ground would be sacrificing substance to form. The case is therefore, to all intents and purposes, that of a mortgagor liable to pay a sum of money to his first incumbrancer paying it and getting a transfer; but that transfer is something which upon general principle he cannot set up against a creditor claiming by a title subsequent to that of the person whose charge he has so paid off: he pays it off for the benefit of the inheritance; and all persons who are entitled to any portion of the inheritance under him are also entitled to the benefit of his having liquidated a demand prior to their title.

*644 * It was, however, said that the present case differs in this respect, that this is not to be treated as a purchase by the mortgagor under the power of sale, but as a purchase by the mortgagor from a stranger who had purchased under the power of sale. If that had been strictly so, if this had been a sale completed to Davies, and then afterwards Davies by an independent transaction had agreed to sell to Mr. Llewellyn, I think that might have given rise to very difficult questions; but that is not the case in any sense. I do not mean to say that there was any deception, or that any thing took place different from what purported to take place. It was no more than this, that originally it was intended that Davies should be the purchaser, and that afterwards it was agreed that instead of his being the purchaser, Mr. Llewellyn should be the purchaser, and as a sort of compliment to him, Davies, for that, Mr. Llewellyn gave him 5*l*. It was, to all intents and purposes, the same as if Mr. Llewellyn had been originally the purchaser, or as if Davies had been originally the purchaser as agent for Mr. Llewellyn. I cannot make any real distinction upon that ground.

It was also said that there was a difference here, because the purchase-money was actually to some extent the money of the

present appellant, who was the sister of Mr. Llewellyn, the purchaser. That, however, comes to nothing when it is sifted. Mr. Llewellyn wished to purchase, but had not the means to do so; he therefore borrowed of his sister 900*l.*, and gave her a bond, which she accepted; but that cannot place her in a different position. When Mr. Llewellyn purchased, he purchased outright, though he owed some money to his sister, and she claims as an incumbrancer under him, and takes the same title as he takes. It might no doubt have been, as it was put in argument, that without purchasing, the * security might have been transferred to the sister so * 645 as to make her merely the transferee of the security; but that is not what the parties chose to do. The sister becomes a creditor of her brother; he therefore makes himself her debtor, and she cannot be in a different position to that in which he is himself.

The case thus appears to me tolerably plain, and I do not see any reasonable ground for the appeal: I must consequently dismiss it with costs.

LANGLEY v. THOMAS.

1856. December 17, 20. Before the Lord Chancellor Lord CRANWORTH.

A testator, having in the commencement of his will appointed his daughter to act in concert with his son to be guardian and executrix, added, "I also appoint and desire in this my last will and testament that my son to be my executor and residuary legatee do jointly with my daughter, my executrix, who is to act independent of her husband and be guardian to the children:" *Held*, that the son alone was entitled to the residue.

THIS was an appeal by the defendant William Thomas from the decision of Vice-Chancellor STUART upon the construction of the will of William Thomas. By his will the testator, after giving some pecuniary and specific bequests, appointed his daughter Jane Langley to act as guardian, in concert with his son William Thomas, of his the testator's grandchildren, and he appointed his said daughter to be executrix of his said will; after giving certain other legacies the testator added: "I also appoint and desire in this my last will and testament that my son William Thomas to

be my executor and residuary legatee do jointly with my daughter Jane Langley, my executrix, who is to act independent of her husband and be guardian to the children named in this my last will and testament."

When the case came on to be heard before the Vice-Chancellor STUART his Honor was of opinion that Jane * 646 Langley was entitled to the residue jointly with her brother William Thomas, as well as to act jointly as executrix and guardian. From that decision the defendant William Thomas now appealed.

Mr. Malins and *Mr. Cole*, in support of the appeal, contended that, in order to give effect to the construction of the Vice-Chancellor, it was necessary to make great interpolations and alterations in the will, whereas by the defendant's construction it was only requisite to supply the omission of the words "who is" after the words "William Thomas."

Mr. Elmsley and *Mr. Burdon*, in support of the Vice-Chancellor's decision. — If the object of the testator was only to appoint Jane Langley guardian by the last clause in the will, that clause was entirely superfluous as he had already appointed her guardian in the previous part of the will. The only sensible interpretation of the language, which was inartificial and ungrammatical, was to attribute to it the meaning which the Vice-Chancellor had done. *Boon v. Cornforth*, (a) *Smith v. Pybus*. (b)

The Lord Chancellor suggested that the next of kin ought to be represented on the record, as it appeared to him that there was room for the argument that the will was void for uncertainty.

December 20.

The case accordingly stood over, and one of the next of kin being an infant, a guardian was appointed for him, and the argument proceeded.

Mr. C. Hall appeared for the next of kin, and contended * 647 * that the gift was clearly void for uncertainty, as it affected to create a trust for a purpose which was not expressed. *Chapman v. Brown*, (c) *Briggs v. Penny*. (d)

(a) 2 Ves. Sen. 277.

(c) 6 Ves. 404.

(b) 9 Ves. 566.

(d) 3 Mac. & G. 546.

Mr. Malins, in reply.

THE LORD CHANCELLOR. — I have no doubt that William Thomas was residuary legatee, but the question is whether he was solely or jointly with his sister interested in the residue. It is difficult in cases of this sort to speak with any thing like certainty as to the meaning of a testator when couched in such ambiguous language. In making the attempt, however, I regret that I cannot arrive at the conclusion of the Vice-Chancellor. It appears to me that the testator in writing the sentence "I also appoint and desire in this my last will and testament that my son," &c., had by inadvertence introduced the word "that," and concluded the sentence forgetting that it had been so worded. The Vice-Chancellor has read the will, striking out the word "do," which I think is a violent liberty to take with the language of the will. The word "do" may have been meant in the sense of to act. It is clear that he intended his executors should do something; what the particular duties were is immaterial, and I am not called upon to determine. Although I think it a very proper case to have been argued by the next of kin, yet I have come to the conclusion that the meaning of the testator was that his son William Thomas should be his sole residuary legatee.

* SWAINSON v. SWAINSON.

* 648

1856. December 20, 24. Before the Lord Chancellor Lord CRANWORTH.

A mortgagor devised his real and personal estate to his wife: she died without paying off the mortgage: *Held*, in a case not falling within the Act 17 & 18 Vict. c. 113, that her heir was not entitled to have the mortgage paid out of the personal estate of the mortgagor.¹

The decision in *Scott v. Beecher*, 5 Madd. 96, followed.

CHRISTOPHER SWAINSON, being seised and possessed of considerable real and personal estate, by his will dated the 11th March,

¹ See *Hickling v. Boyer*, 3 Mac. & G. 635, 644 n. (1), and cases cited; 2 *Jarman Wills* (4th Am. ed.), 401, [559] and n. (2), and cases cited; 1 *Lead. Cas. in Eq.* (3d Am. ed.) 632, [533] *et seq.*

1850, and a codicil thereto dated the 24th June, 1851, devised and bequeathed all his real and personal estate to his wife Elizabeth Swainson, her heirs, executors, administrators, and assigns for ever. Many of the lands and hereditaments thus devised were subject to various mortgages created of the same respectively by the testator.

The testator died on the 19th December, 1854; and Elizabeth Swainson died two days after him, on the 21st December, 1854, intestate, and without having proved his will, and without having done any thing respecting the mortgages. E. Swainson was at her death seised of or entitled to the real estate devised to her by her husband and of personal estate chiefly that bequeathed to her by him.

The plaintiff in the present suit was Charles Low Swainson, one of the next of kin of E. Swainson. The defendant was Edward Christopher Swainson, the heir-at-law of the testator and of E. Swainson, and also the personal representative under letters of administration granted to him of both these parties. The question raised was whether the defendant was entitled to apply the personal estate of E. Swainson, especially that part of it to which she became entitled under the will of C. Swainson, in paying off the mortgage debts for the sole benefit of himself, and to hold * 649 the real estates which descended * to him from E. Swainson discharged from the mortgages; the defendant insisted that he was so entitled. The plaintiff, on the other hand, contended that he, the plaintiff, was entitled to his share of the personal estate of E. Swainson, including the personal estate which came to her from her husband, exonerated and discharged from the payment of the mortgage debts and charges on the real estate; and the bill prayed a declaration of right accordingly. The time of the deaths of Mr. and Mrs. Swainson prevented the case falling within the provisions of the Act 17 & 18 Vict. c. 113.

The cause came on before Vice-Chancellor STUART in July, 1856, when his Honor made a decree in favour of the plaintiff, being of opinion that the case was in principle exactly the same as *Scott v. Beecher*, (a) and that the heir could not claim to hold the real estate exonerated from the charges, unless he could show that he inherited from the person who was bound to pay the debt,

(a) 5 Madd. 96.

which E. Swainson clearly was not. The defendant appealed from this decision.

Mr. Elmsley and *Mr. Wickens*, for the defendant. — We submit that the decision in *Scott v. Beecher* (a) on which the Vice-Chancellor proceeded is not in conformity with the previous authorities, and cannot be supported; it is now brought before a Court of appeal for the first time, and ought to be overruled. The authority of *Scott v. Beecher* was indeed followed by Lord LANGDALE, M. R., in *The Earl of Ilchester v. The Earl of Carnarvon*, (b) but the matter was not discussed. It also appears to have been followed in *Evans v. Smithson*, a case in the exchequer before Lord LYNTHURST (unreported), * but on what grounds is not * 650 known. In *The Earl of Clarendon v. Barham*, (c) however, which came before the Lord Justice KNIGHT BRUCE when Vice-Chancellor, the question was fully argued, and authorities were referred to which were not noticed in *Scott v. Beecher*, and his Honor, though he made a decree in conformity with the decision in *Scott v. Beecher*, stated that he did so contrary to his own opinion and in deference to the cases of *Scott v. Beecher*, *Evans v. Smithson*, and *The Earl of Ilchester v. The Earl of Carnarvon*. This really raises the question whether *Scott v. Beecher* was rightly decided, and it is submitted that it was not. The principle of the earlier cases was that if the executor or legatee of a deceased mortgagor received more than sufficient to pay all the debts of the mortgagor, then the mortgage debt became the personal liability of the devisee of the mortgaged estate, and as between his real and personal representatives his real representative had a right to have the real estate exonerated at the expense of the personal. This is the doctrine of Lord Chief Baron GILBERT, *Lex Præc.* 315, (d) and it is also supported by the decision in *Earl of Belvedere*

(a) 5 Madd. 96. (b) 1 Beav. 209. (c) 1 Y. & C. C. C. 688.

(d) "If the grandfather mortgages his lands, and covenants to pay the mortgage money, and the land descends to the father, and the father dies, leaving a personal estate of his own, it shall not go in exoneration of the mortgage of those lands descended to the grandson, because the personal estate of the father was not liable to the grandfather's debt, and there is no equity that any part of the personal fortune of one should be applied in exoneration of such debt. Whence it seems that if the father had been executor to the grandfather, and the grandfather had left assets to the value of the debt, and the father had converted them to his own use, then so much of the father's personal estate had

* 651 *v. Rochfort*, (a) a case in its circumstances * closely resembling the present. [See also *Lord Effingham v. Napier*. (b)] These authorities were not brought to the attention of Sir W. GRANT in *Scott v. Beecher*, and it is not therefore to be assumed that if they had been he would have decided as he did. They referred to *Bond v. England*. (c)

Mr. Selwyn and *Mr. G. Simpson*, for the plaintiff, supported the decision of the Vice-Chancellor. — This appeal is an attempt to overturn a rule which has been established for a long series of years, and to do this in favour of the very party whom the legislature, as to future cases, has decided shall not be entitled to that which is now sought for him. In addition to the authorities in the plaintiff's favour which have been adverted to on the other side, there is a clear recognition of the state of the law by Lord TRURO in *Hickling v. Boyer*: (d) there all the cases on this subject had been cited, and his Lordship in reference to them says: "Even in reference to a mortgage the cases of *Scott v. Beecher*, *The Earl of Ilchester v. The Earl of Carnarvon*, and *The Earl of Clarendon v. Barham*, show that when the mortgage debt was not the original debt of the person whose estate is to be administered, and he had not made it his own otherwise than by receiving for his own benefit from the original debtor assets sufficient to pay all the debts of such original debtor, the estate must bear the burden, even though the person whose estate is to be administered has charged other parts of his property with the payment of all his debts, and though by receiving such assets he has made himself in one sense personally liable to pay the mortgage." With

* 652 regard to the dictum * of Lord Chief Baron GILBERT it is to be observed that the first part of the passage is in favour of our argument, and that the deduction from it, beginning with the words, "Whence it seems," &c., is really not a logical *sequitur*. The passage was cited to Lord LYNTHURST in *Evans v. Smithson*, but his Lordship nevertheless followed *Scott v. Beecher*. The case of *Earl of Belvedere v. Rochfort* (a) is very special in its circum-

been liable to the payment of the grandfather's debts; and the grandson could, in such case, have come upon the father's executors, to exonerate the mortgage out of the father's personal estate."

(a) 5 Bro. P. C. 299.

(c) 2 K. & J. 44.

(b) 5 Bro. P. C. 221.

(d) 3 Mac. & G. 635; see p. 644.

stances, and there is no report of the judgment of the House of Lords.

Mr. Elmsley replied.

The Lord Chancellor said: Some propositions connected with the case admit of no doubt. If the owner of an estate mortgaged it and died, and the representative of his real estate was a different person from the representative of his personal estate, in this case the real estate would be exonerated from the debt at the expense of the personalty. Again, where the real and personal representative of the mortgagor was the same person no question could arise. What, however, was to happen if, the estate having come to some person, that person died, and his representatives were different, his real estate going to one and his personal to another? It was here that the question arose. Without saying whether there might be a preference in favour of the rule being one way rather than another, the only point of importance was that some rule should be established. I have always understood the rule to be that when an estate in mortgage had once come to the hands of a person filling the character of both real and personal representative of the mortgagor, then the charge became a debt of that person, and was only an incumbrance on the estate. That was the rule laid down in *Scott v. Beecher*, and it was acted on by Lord * LYNDHURST in *Evans v. Smithson*. The * 653 particulars of that case were not known; but the rule was also followed by Lord LANGDALE in *The Earl of Ilchester v. The Earl of Carnarvon*, and again, although with reluctance, by the present Lord Justice KNIGHT BRUCE in *The Earl of Clarendon v. Barham*; it was again recognized and followed by Lord TRURO in *Hickling v. Boyer*. The only necessity, then, being that there should be a fixed rule, there must be some very strong reason shown to induce the Court now to say that all these Judges were wrong, and that if they had attended to those cases in the House of Lords which have been mentioned they would have decided differently. The recent Act of Parliament has strictly no application to the present case, and need not therefore be noticed. The reasons before stated are a sufficient ground for not now interfering with the rule, and for holding that the Vice-Chancellor has come to a right conclusion. I will, however, before finally

disposing of the appeal look into the case of *Earl of Belvedere v. Rochfort*, and mention the matter again.

December 24.

The Lord Chancellor said: I have little to add to what I have before stated on this case. The circumstances of *Earl of Belvedere v. Rochfort* were very complicated, and it is difficult to say on what exactly the Court there proceeded. But whether the law was then understood to be the same as it has since been settled to be or not, it was not sufficient to raise a doubt upon the present occasion after the rule has been acted on as before mentioned. Neither was the present a very favourable time for the Court to be called on to disturb the rule, when, if the lady had lived a very short time longer, the legislature would have settled the question. The appeal will therefore be dismissed.

EVANS v. EVANS.

1855. January 16, 17, 18. February 26. Before the LORDS JUSTICES.

A donee of a power of appointment by deed or will appointed by deed the whole fee, reserving a power of revocation and new appointment exercisable by deed. By a subsequent deed she revoked the uses, trusts, and powers limited and appointed by the former appointment, and appointed the whole fee, reserving a power of revocation and new appointment, exercisable by deed. By a third deed she revoked the uses, trusts, and powers limited and appointed by the last appointment, but declared no new uses: *Held*, that she had not by these deeds precluded herself from exercising the original power by way of testamentary appointment.

A power is not necessarily exhausted by a revocable appointment, and if such an appointment is revoked without having been acted upon, the power is generally, if not universally, still exercisable.

A power of appointment by deed or will is a single power.

A power of revocation and new appointment confers two distinct powers which may be exercised at different times.

Montague v. Kater, 8 Exch. 507, approved of.

¹ See S. C., affirmed, 8 H. L. Cas. 721.

THIS was an appeal from the decision of Vice-Chancellor KINDERSLEY upon a special case, and also in a creditor's suit which had been heard at the same time.

The principal question in dispute was twice argued before the Vice-Chancellor, and is reported in the first volume of Mr. Drewry's Reports. (a) It was whether a donee of a general power of appointment had by a succession of deeds, each revoking the uses declared by the preceding, deprived herself of the right of appointing by will. The deeds are very fully set out in Mr. Drewry's Report. The following is a short abstract of them.

The original power was contained in a settlement of the 19th of April, 1794, made on the marriage of John and Anne Evans, whereby lands were settled to the following uses in the events which had happened; viz., to the use of Anne Evans for life, with remainder, after certain remainders, which did not arise, to the use of such person and persons, for such estate and estates, interest and interests, to take effect at such time or times, in such manner and form as Anne Evans, notwithstanding her coverture, by * any deed or deeds, writing or writings, with * 655 or without power of revocation, to be sealed and delivered by her, in the presence of and attested by two or more credible witnesses, or by her last will and testament in writing, or any writing or writings in the nature of a will, or by any codicil or codicils, to be by her signed, sealed, and published, in the presence of three or more credible witnesses, should from time to time, and as often as she should think fit, devise, direct, limit, or appoint, and in default of such devise, direction, limitation, or appointment, and subject thereto, to the use of Anne Lewis, for her life, with remainder to the use of the second son of Thomas Saunders, with remainders over.

By an indenture of appointment of the 5th of June, 1830, made between Anne Evans of the one part and William Davies and Lewis Evans of the other part, Anne Evans, in exercise of the power contained in the deed of 1794, and all other powers, appointed that the land should, after the determination of the estate prior to the power, remain to the use of trustees for a term of ninety-nine years, to secure certain annuities, with remainder to Bridget Evans for life, with remainder during her life, to the use of William

Davies and Lewis Evans, and their heirs, in trust to preserve contingent remainders, with remainder to the use of the children of Bridget Evans, except an eldest son, as tenants in common in fee; and Anne Evans thereby reserved to herself full power and authority, at any time or times thereafter, by any deed or deeds to be sealed and delivered by her, in the presence of and attested by two or more credible witnesses, to alter, vary, revoke, determine, and make void, either in part or in the whole, the direction and appointment thereinbefore made by her, and all or any of the uses thereinbefore limited of and concerning the said * 656 messuages, lands, and hereditaments thereby appointed * or intended so to be, or any of them, or any part thereof, and by the same or any other deed or deeds, to be sealed, delivered, and attested, as last therein mentioned, to make any other direction or appointment, which might have been made, under and by virtue or means of the power of appointment, reserved to her as therein aforesaid, of and concerning so much and such part of the said messuages, lands, and hereditaments, and the estate and interest therein, to which such revocation should extend.

By an indenture of revocation and new appointment of the 5th of July, 1833, reciting the hereinbefore-mentioned indentures of the 18th and 19th of April, 1794, and the 5th of June, 1830, and reciting that Anne Evans had not in any manner exercised the power of revocation and new appointment, limited to her by the indenture of the 5th of June, 1830, and reciting that Anne Evans was desirous of exercising her said power of revocation and new appointment in manner and to the effect thereafter expressed, and also of substituting Alfred Thomas as a trustee in the place of the said William Davies, Anne Evans, in exercise of the power reserved by the deed of 1830, and every other power, revoked all and every the use and uses, estate and estates, trust and trusts, powers and limitations, limited and appointed by the deed of 1830, and appointed the lands to the use of trustees for ninety-nine years, to secure annuities, with remainder to the use of Bridget Evans for life, with remainder to the use of Alfred Thomas and Lewis Evans and their heirs during her life, in trust to preserve contingent remainders, with remainder to the use of the children of Bridget Evans, except an eldest son, as she should appoint, and, subject to such appointment, to the use of the children of Bridget Evans, except an eldest son in fee. And there

was a power of * revocation and new appointment in exactly * 657 the same terms as in the deed of 1830.

By an indenture of revocation and new appointment, dated the 16th of July, 1835, Anne Evans, in exercise of the power contained in the indenture of 1833, and of every other power, revoked all and every the use and uses, estate and estates, trust and trusts, powers and limitations in the deed of 1833 limited and appointed, and appointed that the lands should remain and be to the use of trustees for ninety-nine years, in trust to secure annuities, with remainder to Bridget Evans for life, with remainder during her life to Alfred Thomas and Lewis Evans and their heirs, in trust to preserve contingent remainders, with remainder to the use of the children of Bridget Evans, except the eldest child, equally in common fee. And there was a power of revocation and new appointment in exactly the same terms as in the former deeds.

By a deed-poll dated the 26th of August, 1836, Anne Evans, in exercise of the power contained in the deed of 1835, and of every other power, revoked all and every the use and uses, estate and estates, trust and trusts, powers and provisos, declarations, and limitations, contained in the deed of 1835.

By her will dated the 3d of March, 1848, Anne Evans, in exercise of the power contained in the deed of 1794, and of every other power, appointed that the lands should remain to the use of the plaintiffs in trust, for sale.

The Vice-Chancellor decided that this testamentary appointment was invalid. The plaintiffs and other parties in the same interest appealed.

* *Mr. Malins* and *Mr. Pitman*, for the plaintiffs, and *The* * 658 *Solicitor-General*, *Mr. Lee*, *Mr. Tripp*, and *Mr. Pearson*, for the other appellants. — The revocation effected by each deed extended not only to the appointment made by the preceding deed, but to the reservation thereby of the power of revocation and new appointment in the particular mode prescribed by such reservation, and left the original power in force unabridged; just as where a use was by a deed limited to the grantor, he was in not of a new but of his old use.

[THE LORD JUSTICE TURNER. — If the appointor were tenant for life with a power of leasing, would he, if he revoked the uses and

took back an estate for life by the new limitation, still have a power of leasing?]

He would.

[THE LORD JUSTICE KNIGHT BRUCE. — Is not the effect of the decision this, that this lady has said, “I will deprive myself of the power of appointment by will” ?]

That is the effect of it; and it is, we submit, sufficient to show that the decision is erroneous, for so extremely improbable an intention ought not to be imputed to her without some clear expression of it, and no such expression can be found in any of these instruments. On the contrary, the will purports to be in exercise of the original power, showing that the testatrix had not meant to relinquish the right of so exercising it.

They also repeated the arguments addressed by them to the Vice-Chancellor, and referred to the following authorities: *Hele v. Bond*, (a) *Montague v. Kater*, (b) *Adams v. Adams*, (c) *Brudenell v. Elwes*. (d)

* 659 * *Mr. Daniell* and *Mr. Greene*, for Mr. Saunders. — The original power is one and undivisible, and not, as the appellants contend, two powers, one to appoint by deed and another to appoint by will.

[THE LORD JUSTICE KNIGHT BRUCE. — How is it material whether it is a single or a double power?]

If it is a single power, the argument mainly relied upon on the other side, that the power of appointment by deed is exhausted, but the power to appoint by will not, falls to the ground. Suppose a man, having a general power, appoints to such uses as a stranger shall appoint. Has he not exhausted the power or could he appoint again? and what difference is there in principle between that case and the present? Suppose the donee of the new power thus created released it, it cannot be contended that the original power would be revived by that proceeding.

(a) *Prec. in Ch.* 474; 2 *Sugd. on Powers*, App. 575, 6th ed.

(b) 8 *Exch.* 507.

(c) *Cowp.* 651.

(d) 1 *East*, 442.

[THE LORD JUSTICE KNIGHT BRUCE. — Do you contend that the old power in this case would have been exhausted if the new one were not exercised?]

Yes; it is not like the case of a resulting use, to which it has been compared on the other side, but depends on altogether different principles.

[THE LORD JUSTICE KNIGHT BRUCE. — Is not the result of your argument, that if a power is exercisable in two modes, and the donee afterwards declares that it shall be exercisable in one of the two modes, she impliedly declares that it shall not be exercised in the other?]

We submit that the power of new appointment is a new one, created by the new deed, and can only be exercised in the mode prescribed by the new deed.

[THE LORD JUSTICE KNIGHT BRUCE. — Suppose an appointment had been made, defeasible on the appointor's return from Rome; could she not on her return have exercised again the power by will as well as by deed?]

Yes; but to make the cases alike the appointment must be, not only defeasible on her return from Rome, but the estate * must be also limited in that event to such uses as she * 660 should by deed appoint, in which case we submit that she could not have appointed by will.

They repeated the arguments adduced by them before the Vice-Chancellor, and referred to *Becket's Case*, (a) *Ward v. Lenthal*, (b) *Smith v. Wheeler*, (c) *Witham v. Bland*, (d) *Bushell v. Bushell*, (e) *Piper v. Piper*, (g) *Sheffield v. Von Donop*, (h) *Doe v. Rusham*. (i)

(a) Lane, 118.

(b) 1 Siderf. 344.

(c) 2 Mod. 40.

(d) 3 Swans. 277.

(e) 1 Sch. & Lef. 90.

(g) 3 Myl. & K. 159.

(h) 7 Hare, 42.

(i) 16 Jur. 859.

Mr. Freeling, Mr. W. H. Harrison, Mr. Berkeley, Mr. Bevir, Mr. Ward, and Mr. Burgess appeared for other parties.

Judgment reserved.

February 26.

THE LORD JUSTICE KNIGHT BRUCE.—These causes, or some of them, have been twice before us. The last, a full, argument, took place in the present year, when various authorities, including the decisions in *Ward v. Lenthal* (a) and *Montague v. Kater*, (b) were commented and relied on. Having since considered the matter with the attention due to the argument, to the authorities, and to the weight of the opinion brought under our review by the appeal, I have now to state the result of that consideration upon my part.

The main if not the only question in controversy concerns * 661 the title asserted by one of the parties, Mr. Thomas * Jones Saunders, to the lands in dispute, with regard to which the case may accurately or without material inaccuracy be represented thus:—

Mrs. Anne Evans, a lady of Wales, who, under a settlement made in 1794, was tenant for life of an estate in that country, being the lands in contest, had, under the settlement, a power of appointing the fee by deed or will; a general power, not restricted as to its objects: in default of execution of which power, the fee was settled on Mr. Saunders, subject of course to her life-estate. In 1830, Mrs. Evans by deed duly executed the power fully, that is to say, so as with respect both to revocation and new appointment to exhaust it, subject to the observation, however, that the deed contained a power enabling her to revoke and newly appoint, a power only to be exercised by deed. This last power she duly executed by deed in 1833 fully, that is to say, so as with respect both to revocation and new appointment to exhaust the power; but subject to this, that the deed of 1833 contained a power enabling her to revoke and newly appoint, a power, however, only exercisable by deed. Afterwards, in 1835, the lady (who seems to have become fond of conveyancing) exercises duly and fully the power reserved to her by the deed of 1833, so as with respect to both revocation and new appointment to exhaust it; but subject

(a) 1 Siderf. 344.

(b) 8 Exch. 507.

to this, that the deed of 1835 contained a power enabling her to revoke and newly appoint, a power only exercisable by deed. Subsequently, in 1836, she duly and fully revokes the deed of 1835, or at least the portions of that deed which consisted of new appointment as distinguished from mere revocation, but she does not by the deed of 1836 newly appoint; and, lastly, in 1848 she makes her will, by which will, if the power of appointment by will vested in her by the settlement of 1794 was after 1836 * in * 662 force and exercisable, she duly and completely exercises and executes it.

The deed of 1830 wholly excluded Mr. Saunders. The deed of 1833 likewise excluded him altogether. So did the deed of 1835; and if she had power to make the will, so did the will. Nevertheless, he contends that the lands are his by virtue of the settlement of 1794, because, as he says, the deeds, or some or one of the deeds, subsequent to it wholly exhausted, and therefore extinguished, the power of appointment reserved or conferred by it; and, neither of the deeds subsequent to 1794 having reserved or given a testamentary power, therefore he says that after 1836 she had no testamentary power; and — the effect of all the deeds subsequent to 1794 taken together having (as he asserts) been to make no appointment at all — he insists that he takes for default of appointment.

Now, in considering this claim, it must of course be taken as clear and undeniable that if the effect of the deed of 1836 was to restore and set up the deed of 1833 and all its provisions, or was to give or restore to Mrs. Anne Evans the same capacity of making an effectual will under the power of 1794 as if she had never since 1794 executed any deed whatever, the claim is untenable. But it has been held to be well founded and tenable, — held so by a Judge whose opinions are justly respected, and by none more than myself.

The claim must be regarded in two points of view, — as to mere fact, and as to mere law. When I say “mere fact,” I refer to the question, whether, upon an examination of the several deeds, they together exhibit, or that of 1836 exhibits, on the part of Mrs. Anne Evans, an intention (apart from any legal necessity and from any rule * merely of law), an intention, I say, merely * 663 in point of fact that the provisions of the deed of 1833 should not stand restored and set up, and also that, unless in the

event of her executing some deed, which she never executed, she should have no power of testamentary appointment. I have looked in vain through the deeds for the exhibition of such an intention. It may, I agree, be taken that her intention was so when she executed the deed of 1835. But Mr. Saunders's alleged title depends on the deed of 1836, and neither the contents of that alone, nor the contents of all the deeds taken together, appear to me to show in point of fact — merely in point of fact — such an intention. If so far I am right, the question to be solved is substantially one of law, and nothing else, — a question, namely, whether necessarily the legal effect of the deeds was not only that the deeds of 1830, 1833, and 1835 became effectually revoked as appointments, but also that (those of 1835 and 1836 having been the last deeds which Mrs. Anne Evans executed) her power of testamentary appointment was abolished.

Of this proposition Mr. Saunders maintains the affirmative, — a proposition which, if he is right in it, casts certainly no light slur on the law of England ; for, in such a state of things, not to say that sense would be defeated by nonsense, at least substance would be destroyed by form. Though a person may, I agree, be reasonably denied a capacity which, having once had and cast away, but having retained the means of reacquiring, he has omitted to reacquire, I can see no reason in a rule prescribing that a revocable disposition of property shall after its revocation, though it has never been acted on, affect and change permanently the rights and powers over the property ; still, whatever is law must be submitted to. But is our law open to such an imputa-

* 664 tion? * Before, however, addressing myself to answer this,

I will, both as to the question of fact and the question of law, say that the advisers of Mrs. Anne Evans ought not to have left ground in this case to dispute upon. If her intention when she executed the deed of 1836 was by it to restore and set up wholly the deed of 1833, why was she not made plainly to say so ? If her intention at that time was not so, but was that afterwards she should have no power to defeat Mr. Saunders by a will unless she should execute some subsequent deed, why was she not made plainly to say so ? If her intention at that time was not of so extraordinary a kind (extraordinary upon the theory that she did not by the deed of 1836 mean to restore and set up the deed of 1833), she might have been made to declare in so many words

that the lands should be held subject to such or the same or the like rights, interests, and powers, as if she had executed not one of the deeds of 1830, 1833, and 1835. Why after the actual deed of 1836 was she not, whether necessarily or unnecessarily, advised for the sake of caution to execute another deed? What are lawyers for?

To return to the legal question. Let it be supposed that the effect of the deed of 1836 was not to restore and set up the deed of 1833 as an appointment, and that after the execution of the deed of 1836, Mrs. Anne Evans had a power of appointment by deed under the instruments of 1830, 1833, and 1835, or under some or one of them; still I do not see any inconsistency with the four deeds taken together in the assertion that after the deed of 1836, she retained or had a power of testamentary appointment under the settlement of 1794. Assuming, in favour of Mr. Saunders, that the effect of the deed of 1836 was not to set up the whole of the deed of 1833, I apprehend that if, after the deed of 1836, any provision contained in the deeds of 1830, 1833, and 1835, or in any one or more of * them, remained in force, what so * 665 remained in force was merely a power to Mrs. Anne Evans to appoint by deed,—a power which she was not bound to execute; which she was entitled to leave, as she did leave it, unexecuted; and which, in my opinion, did not merge, extinguish, or abolish the power to appoint by will contained in the settlement of 1794. If Mrs. Evans, after the settlement of 1794, had executed but one instrument of appointment not testamentary, and that had been a deed of 1837, doing nothing but creating or affecting to create a power in herself, to appoint the fee by a writing “sealed and delivered by her in the presence of and attested by two credible witnesses,” or doing nothing but conferring a life-estate or an estate tail upon some stranger, I am persuaded that she might afterwards have effectually made a will in exercise of the power of testamentary appointment, subject to be wholly or partially defeated by her execution of the power (if any) created or affected to be created by the deed of 1837, and subject to the life-estate or estate tail, if any, appointed by it. Mr. Saunders appears to me not in the least degree more entitled to succeed upon his actual case than he would upon either of the two that I have just been supposing.

Finally, I conceive that by law, a power, which in any mode or to any extent whatsoever has been exercised, but exercised revo-

cably, and the revocable appointment made under which has been well revoked, without having been acted on, is generally, if not universally, in the same force and exercisable in the same manner as if the revoked appointment had not existed, and that a power cannot necessarily be exhausted by a revocable act, though executing otherwise the power to the utmost, more than by a conditional act or by an act of merely partial execution ; of execution, I mean,

in no sense and by no possibility full and complete ; and
 * 666 my opinion is wholly * against Mr. Saunders's alleged title, nor can I avoid regretting that, whether incited or not incited to litigation by the conduct of any of those claiming under the will of 1848, he has become a litigant in this matter, seeking to disappoint the evident wishes and manifest intention of a person who justly had the absolute dominion substantially over the disputed property, seeking this by means of a supposed objection *strictissimi juris* at the best, startling to common sense, not intelligible beyond the pale of English law, nor easily understood within it. Certainly a Judge of weight and consideration has thought the objection authorized by our law, and thinking so he gave of course effect to it as he did ; but I believe that he cannot have done this willingly, or otherwise than under a feeling similar to that which once forced Lord MANSFIELD to say, " All revocations which are not agreeable to the intention of the testator are founded on artificial and absurd reasoning. The absurdity of *Lord Lincoln's Case* is shocking. However, it is now law."

Respectfully differing from the able Vice-Chancellor, I think that we may in obeying the law decide as any man not a lawyer would against Mr. Saunders. Whether his Honor's conclusion is necessarily inconsistent with *Montagu v. Kater*, (a) I need not give an opinion, but certainly I am convinced that the conclusion of the Court of Exchequer in that case was as right in law as it was plainly agreeable to good sense and justice. I must, however, again notice the question, whether the meaning and effect of the deed of 1836, properly construed, were to restore and wholly to set up the deed of 1833, a question that I had, before the hearing of January last, thought serious and difficult ; and this impression, certainly not removed or weakened by the manner in which
 * 667 the argument * on that occasion was conducted, still re-

(a) 8 Exch. 507.

mains. But the point is perhaps rendered practically of little or no importance by these circumstances,—that the purchase-money of the farm contracted to be sold is, as I understand, in Court; that a title and conveyance can and are ready to be made to the purchaser, which will render him safe, whether the true meaning and effect of the deed of 1836 were to restore or wholly to set up the deed of 1833 or not; that one of the suits which were before us in January last, and of which we are now disposing, is the supplemental cause of *Evans v. Morgan*, instituted after our order of last July; that, at the hearing of January in this year, not any of the counsel except those of Mr. Saunders expressed a wish against giving full effect to Mrs. Evans's will; and that unless I mistake, it is for the interest of the parties, not *sui juris*, rather to affirm than to deny that the will ought, as to every portion of it, to have full operation. These things being so, I consider myself not bound to insist on the doubt that I have mentioned, or not to allow myself to concur with my learned brother in an order attributing to the will the complete operation which the original plaintiff, Mrs. Bridget Evans, desires to ascribe to it both as to the debts of the testatrix and otherwise.

One at least of the learned counsel, however, contended that the trustees of the will had so acted as to deprive themselves of any right to some of the costs claimed by them. Upon this point, as well as Mr. Saunders's application for costs, I had rather for the present reserve myself. But considering the manner in which he was caused to come forward as a claimant, I may at once say that in my judgment he ought not to pay any costs.

* THE LORD JUSTICE TURNER. — In this case it appears * 668 that by a settlement of the year 1794 estates were settled subject to some prior uses which have now determined, to the use of Anne Evans for life, with remainder subject to limitations in favour of her children, which did not take effect, she having had no child, to the use of [his Lordship read the limitations], and in default of such devise, direction, limitation, or appointment, to certain other uses under which Thomas Jones Saunders, one of the parties to these suits, claims to be entitled. That by a deed dated the 5th June, 1830, Anne Evans, in exercise of the power of appointment reserved to her by the settlement of 1794, and of all other powers enabling her in that behalf, appointed that after

the determination of the interests limited prior to her power of appointment, the estate should go to certain uses mentioned in that deed of appointment, and which uses exhausted the fee; but that by that deed Anne Evans reserved to herself a power of revocation and new appointment in the following terms [his Lordship read it]. That afterwards by another deed dated the 5th of July, 1833, Anne Evans, in exercise of the power reserved to her by the deed of appointment of 1830, and of all other powers enabling her in that behalf, revoked the uses limited by that deed, and appointed that the estates should go to other uses mentioned in the deed of 1833, which also exhausted the fee, again, however, reserving to herself powers of revocation and new appointment expressed in substance at least in the same terms as the powers reserved by the deed of 1830. That by a further deed dated the 16th of July, 1835, Anne Evans revoked the uses limited by the deed of 1833, and appointed that the estates should go to other uses, which also exhausted the fee precisely in the same form and manner as had

been adopted in the deed of 1833, reserving to herself, however, by this deed, also a power of revocation and * new appointment, expressed in the same terms as the like power reserved by the deed of 1833. That subsequently by a deed-poll dated the 26th of August, 1836, Anne Evans revoked the uses limited by the deed of 1835, and that she did not by that deed-poll or by any subsequent deed declare any new uses, but that by her will dated the 3d of March, 1848, and purporting to be made in exercise of the power reserved by the settlement of 1794, she devised the estates to trustees, in trust to sell and stand possessed of the proceeds upon trusts under which several others of the parties to these suits claim to be interested.

It is between these parties and Thomas Jones Saunders claiming under the limitations of the settlement, in default of appointment, the principal question in these suits arises,—whether the power reserved to Anne Evans by the settlement of 1794, to appoint by will, was subsisting at the time when she purported to exercise that power by her will of the 3d of March, 1848, there being no doubt that the will is a good execution of the power, if the power was subsisting at the time when it was made.

This question was twice argued before the Vice-Chancellor KINDERSLEY; and the conclusion at which he arrived was that the power to appoint by will, created by the settlement of 1794, was

not subsisting at the time when Anne Evans made her will on the 3d of March, 1848. The grounds and reasons on which the Vice-Chancellor founded that conclusion are conveniently summed up by him in the judgment which he gave upon the case after the second argument before him. They are these: 1st. That a power to appoint by deed or will does not constitute two separate and distinct powers, but is a single power, with a restriction on its exercise, requiring it to be exercised by one or other of * those two instruments, but leaving to the donee the option * 670 within the limits of that restriction to choose which instrument he will use in exercising the power; 2d. That powers of revocation and new appointment are two separate and distinct powers. And further that, where, by the terms of the reservation of powers of revocation and new appointment, the donee is authorized to exercise them at his option, either by the same or by different deeds, if he first exercises by deed the power of revocation only, the power of new appointment still continues to subsist as a valid operative power capable of being exercised by a subsequent deed, and admitting that it is competent to the donee of such powers, exercising only the power of revocation, to release or extinguish or destroy the power of appointment which was reserved to him, yet the mere exercise of the power of revocation alone will not *per se* have any such effect; 3d. That where a person has a general power of appointment by deed, whether it be what is called by Lord St. LEONARDS a primary power (*i. e.* a power preceding the uses declared in default of appointment), or be a power of appointment connected with a power of revocation, and following the uses declared by the instrument creating the power, and exercises that power of appointment, and, by the deed exercising that power, reserves to himself a new power of appointment, whether such new power be reserved as a primary power, or as connected with a power of revocation, such power, so reserved, is to all intents and purposes a new power newly created by him, and is not the old power which he has exercised, and that it is equally a new power, whatever be the kind or degree of restriction which he has thought fit to impose on its exercise, and whether he imposes on it precisely the same kind and degree of restriction which was imposed on the exercise of the old power, or a greater or less degree of restriction; 4th. That there is a wide difference between * the case where the donee of a general * 671

power of appointment exercising it by deed, reserves to himself a power of revocation only, and the case where he reserves to himself not only a power of revocation, but also a power to appoint new uses, and that, whatever may be the effect of the subsequent exercise of the power of revocation, where a power of revocation only has been reserved, the effect is very different where a new power of appointment is reserved as well as a power of revocation, and the power of revocation only is exercised. And that, even assuming that in the former case, the effect of the revocation would be to restore the original power, yet, in the latter case, the creation and reservation of the new power of appointment effectually prevents the restoration of the original power.

With the first, second, and third of the positions on which the Vice-Chancellor has thus rested his judgment I agree. I think that the power to appoint by deed or will contained in the settlement of 1794 is no more than a single power, to be executed in one or other of the two different modes pointed out. I think, also, that powers of revocation and new appointment are separate and distinct powers; that the power of new appointment may continue after the power of revocation has been exercised, and that the exercise of the power of revocation will not of itself extinguish or destroy the power of new appointment. Further, I think that where, under the exercise of a general power of appointment, a power of revocation and of new appointment is reserved, the power of appointment so reserved is a new power, and cannot be held to be the old power which has been already exercised. In part, also, I agree with the Vice-Chancellor's fourth position. I think that there may be a difference between cases in which a general power

of appointment being exercised, a power of revocation only
 * 672 is reserved, * and cases in which, upon the exercise of such
 a general power, a power of revocation and new appointment is reserved, and that there may also in these cases be a difference in the effect of the power of revocation only being exercised.

It is upon the conclusion which the Vice-Chancellor has drawn from these premises my difficulty has rested. He says that, even assuming that in the former case — the case of the power of revocation only being reserved — the effect of the revocation would be to restore the original power; yet that in the latter case — the case of the power of revocation and new appointment being

reserved — the creation and reservation of the new power of appointment effectually prevents the restoration of the original power. With great deference to the Vice-Chancellor, whose judgment is entitled to the highest consideration, both from his extensive knowledge of the law of real property and from the care and attention he has bestowed upon this case, I think that he has gone too far in this latter part of his fourth position. He has assumed that the original power contained in the settlement of 1794, has come to an end, and questioned only whether it has been restored. The true question, as I think, is whether it has ever come to an end.

In considering this case, I have been most anxious in the first place to see whether it can fairly be considered to be governed by authority; for I agree with what was said at the bar, — that nothing can be more dangerous than to unsettle the law of real property upon any point, however minute or technical it may be. We must remember that other titles may depend upon the same or similar points. If, therefore, I had succeeded in finding any decision by which the question before us could be ruled, I should have been much disposed to abide by * that decision, * 673 whether my own opinion agreed with it or not; but I have been unable to find any such decision; and it is very satisfactory to me to learn from the Vice-Chancellor's judgment that his researches have been attended with the same result, — that he too considers the precise question presented by this case to be new.

Two cases were much relied on upon the part of the respondent Saunders, — *Hele v. Bond* (a) and *Ward v. Lenthall*; (b) but upon examining those cases, I think it will be found that they have no bearing upon the present case. In *Hele v. Bond* (a) there was a settlement with power to revoke and to limit new uses, the power not being limited to a single revocation and new appointment, but purporting to enable repeated revocations and new appointments to be made. There was then a revocation with a limitation of new uses, but with no power to revoke; and afterwards a revocation of the uses first appointed, with a limitation of new uses. It was held that the uses last appointed did not take effect; but the ground of this decision was that the power contained in the original settlement, so far as it purported to enable

(a) Prec. in Ch. 474; 2 Sugd. on Powers, App. 575, 6th ed.

(b) 1 Siderf. 344.

repeated revocations and new appointments to be made, was not a good power, and we have in this case no such power to deal with. In *Ward v. Lenthall* (a) there was a settlement with power to revoke and limit new uses; then there was a revocation with a limitation of new uses and with power to revoke, but with no power to limit new uses; and then there was a revocation of the uses limited by the first appointment, with a limitation of new uses. It was in this case also held that the uses last appointed did not take effect. From the very loose reports of this * 674 case, it is difficult to collect distinctly the * grounds upon which the decision proceeded; but, as I understand the case, they were these: The exercise of the power of revocation by the first appointment wholly destroyed the uses created by the settlement. The exercise by the second appointment of the power of revocation reserved by the first appointment destroyed the uses created by that first appointment, but did not affect the revocation of the original uses which had been made by the first appointment, and the consequence was that there were no subsisting uses. The fee, therefore, resulted to the settlor, discharged of all the uses; and it was held that the fee having so resulted, the seisin to serve the uses to be created under the power was gone, and that a new seisin was necessary to be created by him to serve the uses limited by the second appointment, a requisite which was supplied by the production of the second fine. But in the present case the fee does not result discharged of all the uses, as it was held to have done in the case of *Ward v. Lenthall*, (a) for there is the power to appoint new uses, reserved by the deed of 1835, which would attach upon the resulting fee.

We must consider, then, how this case stands without reference to these authorities. The power to appoint by deed or will contained in the original settlement is undoubtedly well created; and it lies, therefore, upon those who dispute the exercise of it to show that, before the date of Anne Evans's will, it had become incapable of being exercised. There had been no release of it, no act had been done to affect it unless it had been exhausted by the several deeds of appointment, or destroyed by the new powers of appointment created by those deeds. The question therefore must be, whether those deeds have operated to exhaust or destroy it.

(a) 1 Siderf. 344.

With respect to * the question of exhaustion, it is true that * 675 uses have been from time to time declared, exhausting the fee, but those uses have at all times been revocable. It is true also that powers have from time to time been created to declare new uses, but those powers have not been exercised otherwise than by the creation of uses subject to revocation. At no time has there been a complete absolute limitation of uses exhausting the fee. The uses appointed have always been defeasible. The event on which they have been made defeasible has been the exercise of the power of revocation; but suppose they had been made defeasible upon some other event, as the birth of a child of the appointor. It could not, as I apprehend, have been for one moment contended, that in such a case it would not have been competent to the appointor at any time to appoint new uses, to take effect in the event of such a child being born; and surely the question of the exhaustion or non-exhaustion of the power cannot depend upon the event on which the uses are defeasible, whether they are defeasible by the act of the party, or by some other independent event. It does not seem to me, therefore, that these defeasible uses could exhaust the power.

Could it then be exhausted by the power to appoint new uses? I think not. Such a power is merely a power reserved to do an act, and until the act is done it creates no estate, fills up no chasm. The question may be tested thus, — suppose Anne Evans, in the exercise of her original power, had merely appointed to such uses as she should by deed or will appoint, and had made no further appointment. Whatever might have been said as to the destruction of her original power by the creation of the new powers, surely it could not have been said that she had exhausted her power, for no uses would have been limited under it.

* Assuming, then, that there had been no exhaustion of * 676 the original power had there been a destruction of it by the creation of the new powers, are the new powers to appoint by deed, contained in the several deeds of appointment, to be taken to have destroyed the original power to appoint by deed or will? This question must, I think, be governed by the intention. Cases may be put in which the intention to substitute a new power for the original power would be manifest. Suppose, for instance, a power to appoint by deed only, requiring that the deed should be attested by two witnesses, and a new power to be created to ap-

point by deed attested by three witnesses. There would, I apprehend, be little, if any, doubt that the latter power would be taken to be in substitution of the former, and that the former power could not be exercised whilst the latter was subsisting; but what we are called upon here to say is, that a power to appoint by deed only, has operated to destroy the original power to appoint by deed or will. I think that very clear evidence of intention would be necessary to justify such a conclusion, for the substitution of the less extensive power would be in derogation of an existing right. In my opinion, there is no such evidence of intention in this case as could justify the conclusion.

Doubts have been suggested whether two general powers of appointment in fee can exist in the same person at the same time; but without reference to this question (although, having regard to the nature of powers, I feel no serious doubt upon it) there can be no doubt that a power to appoint in fee by deed or by will may coexist in the same person, and I see no reason why, if the power to appoint by deed, created by the several deeds of appointment in the present case, is at all to be taken to affect the original power, it should not be taken merely as in substitution for * 677 that branch of the power which it * purports to replace, viz. the power to appoint by deed. Suppose that Anne Evans had by the deeds of appointment in terms declared such to have been her intention, it cannot surely be denied that effect might and must have been given to her declared intention, and, I apprehend, that it is no less the duty of the Court to carry out the intention, whether it is in terms expressed or not, provided it is sufficiently indicated.

It has been said that the uses created by the deeds of appointment must be regarded as introduced into the original settlement; but, if so introduced, they must be introduced with the power of revocation and the power to appoint new uses by deed; and if the original power be not, as I think it is not, exhausted, either by the limitation of the revocable uses or by the creation of the new power to appoint by deed, why is the power to appoint by will to be taken out of the settlement? Are the parties, who are entitled only in default of appointment, to be placed in a better situation by the imperfect exercise of the power? In the result of all these instruments Anne Evans has, in effect, created only a power to appoint by deed. It cannot, I think, make any difference that this has

been the result of several instruments; and if it had been effected by one deed only, merely creating a power to appoint by deed, I cannot think that the creation of such a power could have been held to have exhausted or destroyed the power to appoint by will.

Upon the whole, therefore, my conclusion is that Anne Evans had power to appoint by will, when her will of the 3d of March, 1848, was made, and I think this conclusion is much fortified by the decisions and reasoning in the cases of *Sheffield v. Von Donop*, (a) and *Montagu * v. Kater*, (b) although neither * 678 of those cases can be said to be exactly in point with the present.

A further question has been raised in this case, whether the revocation by the deed of 1836, of the uses declared by the deed of 1835, may not have operated to restore the uses declared by the deed of 1833. My learned brother has entertained very great doubt upon this question, and I need hardly say that the doubts which he has felt render me less confident than I should otherwise have been, in the opinion which I have formed upon it. My opinion, however, is, that the revocation by the deed of 1836 did not operate to restore the uses limited by the deed of 1833. I think that the revocation of those uses by the deed of 1835 was absolute, and that the case in this respect cannot properly be likened to the case of a repealing statute restoring other statutes which have been abrogated by the statutes repealed. In such cases the revival of the original statutes takes place by virtue of the repeal, but in a case like the present, the question, as I conceive, must be governed by intention, and there is nothing to show that there has been any intention to destroy the absolute effect of the prior revocation.

(a) 7 Hare, 42.

(b) 8 Exch. 507.

1854. December 12, 13, 14, 20. . 1855. January 30. Before the LORDS JUSTICES.

Indorsees of bills of exchange as a security for a floating balance due on the accounts between them and the drawer had notice that the acceptor was a surety for the drawer. They afterwards entered into an agreement with the latter that the existing debt should be liquidated by the drawer building for them certain ships, and should, in the mean time, be secured by a policy of assurance: *Held*, —

1. That time was thus given to the principal debtor, and that the surety was released in equity, if not at law also.¹
2. That a creditor who holds a floating guarantee from a surety cannot, without the surety's consent, give time to the principal debtor as to a portion of the debt, without reserving the creditor's rights against the surety, and yet hold the surety liable for that portion.
3. That whether the acceptor could or could not use, by way of defence to an action by the holders of the bills, the giving of time by them to the drawer, he was not bound to do so, but might (at the risk of costs) defend the action on other grounds, and also institute a suit for equitable relief and an injunction to restrain the proceedings at law, though if the matter had been pleaded at law, and the Court of Law had adjudicated on the plea, the case might have been different.

THIS was an appeal from an order of Vice-Chancellor KINDERSLEY restraining proceedings at law on two bills of exchange. By arrangement the cause came on to be heard at the same time.

The bills in question were for 1000*l.* each, and were dated the 3d of September, 1846, drawn by Benjamin Davies, one of the defendants, upon his uncle, Daniel Davies the plaintiff, in favour of and made payable to Christopher Stainbank and Richard Henry

¹ See Kerr Inj. 78, and cases in note (j); *Pooley v. Harradine*, 7 Ell. & Bl. 431; *Taylor v. Burgess*, 5 H. & N. 1; *Greenough v. M'Clelland*, 2 L. T. N. S. 571; 6 Jur. N. S. 772; 30 L. J. Q. B. 15; 2 El. & El. 424; American notes to *Rees v. Berrington*, 3 Lead. Cas. in Eq. (3d Am. ed.) 570 *et seq.*; *Mutual Loan Fund Association v. Sudlow*, 5 C. B., N. S. 449; *Owen v. Homan*, 3 Mac. & G. 400, n. (1) and cases cited; *U. States v. Howell*, 2 Am. Lead. Cas. (4th ed.) 372 *et seq.*, and notes, in which this subject is discussed and cases cited; *Bailey v. Edwards*, 4 B. & S. 761; *Wythes v. Labouchere*, 3 De G. & J. 593; *Ewin v. Lancaster*, 6 B. & S. 571; 1 Story Eq. Jur. § 498 *a*; *Ex parte Graham*, 5 De G., M. & G. 356; *Harris v. Brooks*, 21 Pick. 195; *Hunt v. Bridgham*, 2 Pick. (2d ed.) 581 and notes.

Stainbank, two other defendants. One of them was payable in 1847, the other in 1848. It appeared upon the result of the evidence, that as between the plaintiff and Benjamin Davies, the plaintiff was a surety merely.

In August, 1850, the bills remained unpaid in the hands of the Stainbanks, and had been placed by them to the debit of Benjamin Davies, and formed part of a large balance due from Benjamin Davies to them. The bills were left in the hands of Messrs. Stainbank, as a guarantee for the floating balance from time to time due from * Benjamin Davies to them to the extent of * 680 2000*l.* At and previously to that time the Stainbanks were aware that the plaintiff claimed to stand in the position of surety merely on the bills.

In September, 1850, Daniel Davies the younger, a brother of Benjamin Davies, came over to England from Prince Edward's Island, for the purpose of coming to a settlement on behalf of his brother with the Messrs. Stainbank.

After some communications had taken place between Daniel Davies the younger and the defendant R. H. Stainbank, the acting partner of the firm of Stainbank & Son, the following memorandum was drawn up:—

“ Memorandum of the understanding between Mr. Daniel Davies of Charlotte Town, Prince Edward's Island, on behalf of his brother Mr. Benjamin Davies of the same place, and Messrs. C. Stainbank & Son of London. The balance due from Mr. Benjamin Davies to C. Stainbank & Son being now agreed at 8047*l.* 3*s.* 10*d.*, it is agreed that the four vessels that have been already despatched from the island this season, viz., schooner Kestrel, bark Essex, schooner Minna, and brig not yet named, together with their freights and cargoes, to be realized as soon as practicable after their discharge in England, and the produce, less the charge and commission, to be placed to the credit of Benjamin Davies, in part payment of the above balance of 8047*l.* 3*s.* 10*d.*, and which it is estimated will altogether produce about 4900*l.*, leaving a balance then due, or a presumed balance to C. Stainbank & Son of about 3147*l.* or more, if Benjamin Davies has occasion to draw any further small sums of Messrs. Stainbank & Son.

“ It is agreed between C. Stainbank & Son and Benjamin
* Davies, that when the before-mentioned balance (now * 681

estimated at 3147*l.*) can be correctly ascertained, the present running account with Benjamin Davies shall be closed for liquidation.

“ That the first step towards the liquidation shall be the building and completion of a ship of 400 tons register by Benjamin Davies (he having on hand the greater part of the materials ready for the purpose), to be called the Charlotte, which vessel is to be ready for launching the early part of the ensuing season, say before the 5th of August, 1851.

“ To enable Benjamin Davies to complete the said vessel for sea, C. Stainbank & Son engage next year to supply stores and to accept Benjamin Davies’s drafts for provisions, &c., to the extent of 500*l.* altogether or more, if they think proper; which stores on being shipped and bills on being accepted are to be placed to the debit of an account to be specifically opened for Benjamin Davies as an account for advances and for the ship Charlotte; and any stores ordered by Mr. Benjamin Davies shall be ordered distinctly for this account, and any drafts drawn shall state on them to be placed to the bill account, namely, advances for the ship Charlotte.

“ If it should hereafter be determined to build a larger ship than 400 tons, the advances to be increased in proportion, and if cargo is shipped on the ship’s accounts, C. Stainbank & Son to advance the invoice cost thereof.

“ That the Charlotte shall be despatched as soon as she can be rigged and loaded for London, where, as soon as practicable after her arrival, the vessel shall be sold, and the proceeds, together with freight or cargo, less all charges and commission,
* 682 shall then be placed to the * credit of Benjamin Davies in liquidation of the before-mentioned balance.

“ That the further discharge of the said balance shall proceed annually, either in like manner or by remittance, to the extent of 300*l.* per annum. It is further understood that Mr. Benjamin Davies shall, without delay, effect an insurance on his life for 1500*l.*, and pay the annual premium thereon, the policy of which is to remain with C. Stainbank & Son till the balance be paid in full, after which it is to become the property of Benjamin Davies or his assigns.”

This agreement was not signed; but upon the evidence it ap-

peared to have been adopted by Benjamin Davies and acted on by him and the Stainbanks.

In 1852, Messrs. Stainbank commenced an action against the plaintiff Mr. Daniel Davies, senior, on the bills. He defended it, pleading in effect that, by means of transactions between Benjamin Davies and the Stainbanks, the bills had been satisfied. He also pleaded a set-off.

The action was tried in March, 1853, and a verdict found for the plaintiffs for 2000*l.*, the full amount claimed.

The present suit was then instituted, in which the plaintiff stated, by his amended bill, that he had, since the institution of the suit, discovered the above-mentioned agreement of September, 1850, made between the drawer and the holders of the bills, whereby, as the plaintiff submitted, the drawer had, for valuable consideration, given the holders time for payment of the debt.

* The prayer was for delivery up of the bills, and for an * 683 injunction to restrain execution in the action.

Upon a motion for an injunction, the Vice-Chancellor, on the 9th of June, 1853, made the order under appeal, whereby it was ordered, that the plaintiff Daniel Davis should, within twelve days, pay into Court, to the credit of the cause, 2525*l.*; and that thereupon, and on the plaintiff by his counsel undertaking to pay to the defendants Christopher Stainbank and Richard Henry Stainbank, their taxed costs of the action at law, an injunction should be awarded against the defendants Christopher Stainbank and Richard Henry Stainbank to restrain them and their agents, till further order, from proceeding in the action, and from commencing or prosecuting any other action at law against the plaintiff touching the bills; and the defendants were to be at liberty to apply to the Court after the decision of the House of Lords in the suit of *Owen v. Homan*. (a)

From this order the present appeal was brought, and by consent the cause came on for hearing, at the same time further evidence being adduced orally and otherwise.

Sir Fitzroy Kelly, Mr. Bacon, Mr. Rochfort Clarke, and Mr. Giffard, for the plaintiff Daniel Davies the elder.—It is clear upon the evidence that the plaintiff accepted the bills as a surety

(a) Reported 3 Mac. & Gor. 378, and 4 H. L. Cas. 997.

for Benjamin Davies, and that this was known to Messrs. Stainbank when they took the bills. That being so, and the Messrs.

Stainbank having acceded to the terms of the memorandum,
 * 684 which, although not signed, was acted upon, they, we * submit, thereby gave time to the principal debtor and released the surety. The only remaining point is, whether, as they did not set up this defence to the action, they are precluded from resorting to a Court of Equity to be relieved against the proceeding at law. In the first place, the fact was not discovered in time to be pleaded to the action. In the next place, we could not at law against the written instrument show that Davies was a surety.

[THE LORD JUSTICE KNIGHT BRUCE. — Would a Court of Law consider that the written contract would be varied by showing him to be a surety?]

It would at law be so considered. But however this may be, there is a ground for equitable interference, and the plaintiff had a right to file a bill, even if the ground of relief might have been made available at law. It could not, however, have been made available at law, inasmuch as the acceptor would there be held to be the principal debtor. It will be objected on the other side, that the agreement for giving time, not being in writing, was not effectual, and therefore had not the effect contended for; but it was acted upon, and was therefore binding in a Court of Equity, where proceedings against the principal debtor on the bills would have been stayed on the ground of the agreement having been entered into.

They referred to *Powell v. Dillon*, (a) *Abbott v. Hendricks*, (b) *Manley v. Boycot*, (c) *Thompson v. Clubley*, (d) *Solly v. Hinde*, (e) *Adams v. Wordley*, (g) *Ashbee v. Pidduck*, (h) *Foster v. Jolly*, (i) *Fentum v. Pocock*, (k) *Price v. Edmunds*, (l) *Rees v. Berrington*, (m) *Besant v. Cross*. (n)

(a) 2 B. & B. 416.

(b) 1 Man. & Gr. 791.

(c) 2 El. & Bl. 46.

(d) 1 M. & W. 212.

(e) 2 Cr. & Mee. 516; 4 Tyrwh. 305.

(g) 1 M. & W. 374.

(h) 1 M. & W. 564.

(i) 1 C., M. & R. 703; 5 Tyrwh. 239.

(k) 5 Taunt. 192.

(l) 10 B. & C. 578.

(m) 2 Ves. Jr. 540.

(n) 10 C. B. 895.

* *The Solicitor-General, Mr. J. Baily, Mr. Willes, and* * 685
Mr. Druce, for Messrs. Stainbank. — Even if the plaintiff had not been privy, and consented to the agreement of which he now complains, still the evidence does not show that he was a surety, or, at all events, that this was known to Messrs. Stainbank when they took the bills. They cannot, therefore, be affected by that circumstance if it existed. The alleged agreement was one which could not have been made available at law or in equity, for the purpose of discharging the principal debtor, especially when, as in this case, the debt secured was a floating balance, to which, we submit, the principle relied upon as to time being given to the principal would not apply. But in truth the plaintiff knew and concurred in the agreement of September, 1850.

They referred to *Pease v. Hirst*, (a) *Harrison v. Nettleship*, (b) *Adams v. Wordley*, (c) *Bank of Ireland v. Beresford*, (d) *Laxton v. Peat*, (e) *Newton v. Chorlton*. (g)

Mr. Hallett, for other parties.

Sir F. Kelly replied.

Judgment reserved.

January 30.

THE LORD JUSTICE KNIGHT BRUCE. — In the year 1846, Messrs. Stainbank, merchants of London, who, with Mr. Benjamin Davies (a merchant or * dweller in Prince Edward's Island) * 686 are the defendants in this suit, became the holders of two bills of exchange for 1000*l.* each, dated in that year, which, according to their tenor, respectively became due in 1847 and 1848. They were drawn by the defendant B. Davies upon his cousin the plaintiff, who is or was a solicitor in London or Middlesex, and accepted by the plaintiff — accepted as he says by way — and merely by way — of suretyship for the drawer, B. Davies, to Messrs. Stainbank, the payees, who in 1852 commenced an action

(a) 10 B. & C. 122.

(d) 6 Dow, 233.

(b) 2 Myl. & K. 423.

(e) 2 Campb. 185.

(c) 1 M. & W. 374.

(g) 10 Hare, 646; see *Strong v. Foster*, 17 C. B. 201; *Hollier v. Eyre*, 9 Cl. & Fin. 1.

against the plaintiff upon the bills. He defended it, contending and pleading, in effect, that, by means of transactions between the drawer and the payees, the bills had, by payment or otherwise, become satisfied, and that nothing therefore was or could be due from the acceptor on either of them. He also pleaded a set-off.

Messrs. Stainbank denying the truth of the pleas, issue was joined on them; and, before trial, the plaintiff instituted the present suit for discovery and relief against the bills; not, however, as I collect, suggesting, by the original frame of it, any other title to relief than the grounds of defence alleged in the pleas, — grounds that I have already mentioned.

The action was tried on the third or fourth week of March, 1853, when a verdict was found in favour of Messrs. Stainbank for the full amount purporting to be secured by the bills of exchange; namely, 2000*l.* with interest.

Afterwards, if not sooner, it was alleged by the plaintiff that he had discovered, that, in 1850, an agreement had, without his consent or knowledge, been made between Messrs. Stainbank and B.

Davies, by which Messrs. Stainbank had, for valuable consideration, given * B. Davies time for payment of the debt, * 687 represented or secured by the two bills of exchange; and that, by means of it, the plaintiff was discharged, in equity at least, from them. The plaintiff accordingly, by amending his bill of complaint, brought it to the form in which it is now before us, making that case and praying relief on that foundation.

To return to the verdict, perhaps it was not — perhaps it was — according to the truth, so far as it found the bills of exchange not paid nor satisfied, but it was probably an honest verdict; and appears to have been approved by Mr. Baron ALDERSON, who tried the cause, and who seems, as well as the jury, to have thought the bills of exchange intended to form what has been called a floating guarantee for B. Davies from the plaintiff to Messrs. Stainbank. The soundness, however, of the finding, if the point were open, might possibly be disputable upon all the materials before us, including those before the jury, or even upon those before the jury alone; but the point is not open, inasmuch as, after an ineffectual attempt at law to disturb the verdict, Messrs. Stainbank obtained final judgment on it. The judgment seems to have been duly entered up, and to be at law binding, — at law conclusive.

After the trial this order was made in the present cause by the Vice-Chancellor KINDERSLEY. [His Lordship read it.]

The money, I believe, has accordingly been brought into Court, and is now here representing the judgment, except the costs.

The hearing before us has been on an appeal from that order, and also at the request of the plaintiff and Messrs. Stainbank (without any dissent on the part of * Mr. B. Davies) * 688 upon an original motion for a decree. The argument, a full as well as able one, took place in December last, after which, in the same month, an oral examination of the plaintiff, of Mr. Stainbank, junior, and of others as witnesses was had before us. We have since considered the whole controversy, so far as the judgment at law has not rendered it unnecessary to do so, that judgment having reduced the dispute between the litigants to these points : —

First. Did the plaintiff accept the two bills of exchange as a surety of B. Davies ?

Secondly. Was that known to Messrs. Stainbank when they took the bills ?

Thirdly. Was the plaintiff's responsibility to Messrs. Stainbank upon the bills, whether in the nature of a floating guarantee or otherwise, of such a kind as to be liable to be discharged by their giving time — if they should give time — to B. Davies without the consent of the plaintiff, that is, to be so discharged, at least in equity, if not at law also ?

Fourthly. Did Messrs. Stainbank give time to B. Davies without the plaintiff's assent, and in such a manner as to discharge him equitably if not legally also ?

Fifthly. Could the plaintiff, who did not raise this point by way of plea or defence in the action, have effectually done so ? and

Sixthly. Whether the judgment at law precludes him from equitable relief.

* The plaintiff maintains the affirmative of the first, second, third, and fourth of these questions, and the negative of the two others. * 689

With regard to the first, second, and third, I think that the plaintiff has established his case by the evidence, and is certainly so far right. It seems to me that a creditor who holds a floating

guarantee from a surety cannot, without the surety's consent, give time to the principal debtor as to a portion of the debt, without reserving the creditors' rights against the surety,¹ and yet hold the surety liable for that portion; the necessary consequence of the act being that, for a period of more or less duration, the principal debtor is protected at once against the creditor, and against the surety from a demand for payment of the amount so dealt with.

The fourth question divides itself into three parts. That time was given, there can be no doubt if the paper of the 19th of September, 1850, contains the terms of an agreement made between Mr. Richard Stainbank (for Messrs. Stainbank) on one hand, and Mr. Daniel Davies, Jr. (for B. Davies), on the other, — if the agreement was accepted and ratified by B. Davies, and if he acted upon it, whether afterwards he broke or did not break it. And the evidence satisfies my mind, that the paper of 19th September, 1850, does contain the terms of an agreement so made; and, moreover, that the agreement was accepted and ratified by B. Davies, and that he acted upon it. The Statute of Frauds creates in my opinion no impediment, no difficulty, circumstanced as the case was and is. If, then, this agreement became, as I think it did, binding on Messrs. Stainbank and B. Davies, it had, in my opinion, the effect of discharging the plaintiff, if not both at law and in

equity, at least in equity, from responsibility to Messrs. Stain-
 * 690 bank on the bills, unless the plaintiff * assented to it; for it did not reserve to the creditors liberty to proceed, as they otherwise might have done, against him. And the conclusion is, I think, inevitable that, upon the assumption of the two bills not having been actually satisfied (an assumption which the verdict and judgment at law sanction and render necessary), the agreement extended to the debt represented or secured by the two bills; and materially, and to his prejudice (as he has, I conceive, a right to say), affected his rights, remedies, and position, in respect of the bills.

Did he then assent to the agreement? It is as to this point

¹ See, as to reserving the creditors' rights against the surety, *Owen v. Homan*, 3 Mac. & G. 378, 406, and cases in note (1); S. C., 4 H. L. Cas. 997, 1038; *Wyke v. Rogers*, 1 De G., M. & G. 408 and cases in note; *Ex parte Harvey*, 4 De G., M. & G. 881; *Kearsley v. Cole*, 16 M. & W. 128; 16 L. J. Ex. 115; *Close v. Close*, 4 De G., M. & G. 176; *Bailey v. Edwards*, 4 B. & S. 761, (Am. ed.) and note at the end of that case; *Clagett v. Salmon*, 5 Gill & J. 314; *Sohier v. Loring*, 6 Cush. 537; *Hutchins v. Nichols*, 10 Cush. 299; *Peay v. Poston*, 10 Yerger, 111; *Kerr Inj.* 73.

especially that the oral and other evidence before the Court, which cannot all be reconciled together, has required from us the closest and most deliberate consideration. That deliberation it has received. The burden of proving the assent lies, I think, certainly on Messrs. Stainbank. The clear establishment of the fact that they agreed to give, and did give, time to B. Davies, appears to me to render this indisputable. Have, then, Messrs. Stainbank discharged themselves of the burden? Does the evidence prove the plaintiff's assent? In my judgment not. If I had been acting as a juror, my verdict, at the close of the examination *viva voce* here, would have been so, — and subsequent reflection, aided by the answers in the cause, by the written testimony, and by the shorthand writer's notes of the trial, has confirmed the impression. I must be, therefore, for determining the fourth question entirely in favour of the plaintiff.

As to the fifth, without giving any opinion upon it, I will assume that it ought to be answered in the affirmative, and therefore against him; my view of the sixth rendering the fifth in my estimation immaterial. For I think that the plaintiff, if he could have pleaded, or used by way of defence to the action, the agreement to give, and * the giving of time by Messrs. Stainbank * 691 to B. Davies, was not bound to do so, but was entitled to defend the action, whether successfully or unsuccessfully, on other grounds (at the risk, of course, of costs), and also to institute a suit here for relief on that point, — if not guilty of improper delay; and I think that the plaintiff has not been guilty of improper delay. For the deficiencies of the original bill filed before the trial a sufficient apology, as it appears to me, if an apology was needed, has been shown. The rule *nisi* for a new trial was not discharged, I believe, before the 25th May, 1853. The suit here was put into its present shape by amendment, either before or very soon after the 9th of June, 1853 (the date of the Vice-Chancellor's order), and Messrs. Stainbank's costs in the action seem to have been at that time untaxed. Those costs, as taxed, if they have not received, they must receive; and if they have received, they must retain, as it appears to me; for their opponent, the plaintiff here, must be taken not to have been justifiable in defending himself at law as he did. Had he proceeded otherwise, we might possibly have given him or relieved him from the whole or part of the costs of the action. For, in my opinion, he has established a title to relief

in equity against the demand, the subject of it. I think, therefore, that the injunction ought to be made perpetual (the taxed costs at law being paid), that the two bills of exchange should be either delivered to the plaintiff or deposited in Court, and that the fund in Court should be transferred or paid to him.

With regard to the costs of this suit, I have come to the conclusion that there should be none on either side, the bill raising, as it does, at least one question which we are obliged to consider the judgment at law as having finally decided against the
 * 692 plaintiff in equity, who has * thus added materially to the expense of the litigation in what we must hold to be an unjustifiable manner.

THE LORD JUSTICE TURNER. — The bill in this cause is filed by Daniel Davies the elder, against Christopher Stainbank and Richard Henry Stainbank, merchants in London, and Benjamin Davies, a merchant at Prince Edward's Island, for the purpose (amongst other things) of having two bills of exchange for 1000*l.* each, dated respectively the 3d of September, 1846, drawn by the defendant Benjamin Davies upon and accepted by the plaintiff in favour of and made payable to the defendants the Stainbanks, delivered up to be cancelled.

The title of the plaintiff to this relief is rested by the bill upon several distinct grounds. First, that the bills have been paid or satisfied in account. Secondly, that the bills were given only to secure the performance by Benjamin Davies of certain engagements entered into by him, and which he fully performed. Thirdly, that whether the bills were given for the particular purpose alleged or not, they were at all events accepted by the plaintiff only as a surety for Benjamin Davies, and that the Stainbanks took a mortgage from Benjamin Davies, which covered the amount due upon the bills, and that there was default on their part in not recovering or not retaining the whole or some part of the property comprised in the mortgage; and, fourthly, that the plaintiff, being a surety only, has been discharged by time having been given by the Stainbanks to Benjamin Davies for payment of the amount due upon the bills.

There has been an action at law brought by the Stainbanks against Benjamin Davies upon these bills; and, upon the
 * 693 trial of that action, the jury found that the * bills were

accepted by the plaintiff not as surety for the performance of the particular engagements referred to, but as a continuing surety for the balance of Benjamin Davies's account with the Stainbanks to the amount of 2000*l.* The Stainbanks, therefore, recovered in the action at law, against the plaintiff, the 2000*l.* and interest upon it; but in the mean time, pending the action, the bill in this cause was filed. Upon a motion made before Vice-Chancellor KINDERSLEY, for an injunction to restrain further proceedings in the action at law, it appeared, that in the year 1852, an arrangement was come to between the Stainbanks and Benjamin Davies for the settlement of the account between them, in which these bills were included; and that, by that arrangement, the rights of the Stainbanks against the plaintiff upon the bills were reserved; and, in this state of circumstances, it was thought that the rights of the parties might be affected by the decision of the House of Lords in a case of *Owen v. Homan*, then pending before them. Vice-Chancellor KINDERSLEY accordingly made the order (which my learned brother has read), granting the injunction upon the terms of paying the money into Court, with liberty to the plaintiff to apply upon the decision of the House of Lords in the case of *Owen v. Homan* being pronounced.

The case having been brought before us upon appeal from this order, it was agreed that we should finally dispose of the question between the parties as upon the hearing of the cause. Further affidavits have accordingly been filed. The plaintiff, the defendant R. H. Stainbank, and several other witnesses, have been examined before us, and we have now to dispose finally of the case.

It was conceded, and properly conceded, in the argument * before us, that the result of the proceedings at law * 694 has disposed of the first two grounds upon which the plaintiff's case is rested by the bill. It is not material, therefore, to consider those parts of the case except with reference to the question of costs. Neither do I think it material to enter into the questions as to the effect of the mortgage, or what was done or omitted to be done under it. The true point upon which the rights of these parties depend seems to me to be whether the plaintiff has been discharged in equity from his liability upon these bills by time having been given by the Stainbanks, the payees, to Benjamin Davies, the drawer, for payment of the amount due upon them; and, in determining this point, I think it will be sufficient to

examine the transaction of September, 1850, and to look into the circumstances connected with it, and the evidence which has been given in relation to it.

It appears, then, that in the month of August, 1850, Daniel Davies the younger, the brother of Benjamin Davies, came over from Prince Edward's Island to this country, with authority to settle Benjamin Davies's account with the Stainbanks; and that the amount of these bills had long before been placed to the debit of Benjamin Davies in that account, and then formed part of a much larger sum due to the Stainbanks upon it. It may, also, I think, be taken as a fact both from the verdict of the jury in the action, and from the whole of the evidence before us, that the plaintiff (whatever may have been his position as to the Stainbanks) was, as between him and Benjamin Davies, a surety, merely, upon these bills; and the evidence establishes, to my entire satisfaction, that the Stainbanks at this time knew that the plaintiff claimed to stand in that position. The letter of the 6th of March, 1848, alone seems to me to be conclusive upon that point.

* 695 [His Lordship read the * letter, which contained the following passages: "I am hurt, beyond expression, to find your letter of Saturday in allusion to Benjamin Davies's bill, but am too busy to call on you. You know I was really only guarantee for him on the condition of your letter of August, 1846, and having the highest opinion of your honour and integrity induced me to be a party to the transaction. . . . I do not in any degree wish to avoid meeting the matter on proper terms, but when I am only a guarantee, the debtor should be called on first."]

After that letter, I think it is impossible for the Stainbanks to deny, that in the month of September, 1850, they knew that the defendant claimed to stand in the position of a surety as to these bills.

In this state of circumstances, in the month of September, 1850, the following memorandum was drawn up: [His Lordship read it as set out *ante*, p. 680.] Assuming this memorandum to amount to an agreement, I feel no doubt that the time for payment of the balance of Benjamin Davies's account (including as it did the amount of the bills) was enlarged by that agreement; and that there was sufficient consideration to support the enlargement of the time. The true test of this question is, whether, assuming the

memorandum to have amounted to an agreement, the Stainbanks could have sued Benjamin Davies for the balance of the account, in defiance of the arrangement contained in the memorandum. I think that they could not, and that there would have been at least an equity on the part of Benjamin Davies to restrain such proceedings, if any such had been attempted by the Stainbanks.

It was said, however, that the terms contained in this memorandum, if not repudiated, were not adopted or * acted * 696 upon by Benjamin Davies, but I think the evidence clearly shows that Benjamin Davies acted upon those terms. It is true, indeed, that he did not fully carry out the stipulations, on his part, which were contained in the instrument ; but he carried them out to a considerable extent, as the defendant R. H. Stainbank himself admitted upon his cross-examination before us. The true state of this part of the case, as it seems to me, is that Benjamin Davies adopted the agreement, but afterwards failed in part to perform it.

Another argument which was urged on the part of the Stainbanks, with reference to this agreement, was, that the plaintiff might have pleaded at law that he was surety merely, and that the time given by the agreement had operated to discharge him, and that this Court would give no relief against the consequences of defective pleading at law. This point of legal pleading was very much laboured in the argument before us, but I think it unnecessary to give any opinion upon it. This Court, as I apprehend, has at all times exercised jurisdiction in cases of this nature. It is, in the eye of this Court, a fraud in a creditor to proceed at law against a surety, after he has agreed with the principal debtor to enlarge the time for payment of the debt ; and this Court relieves against the fraud. The mere fact, that a Court of Law, if called upon to do so, might possibly exercise concurrent jurisdiction in such a case, cannot defeat the jurisdiction of this Court to interfere. If, indeed, the matter had been pleaded at law, and the Court of Law had entertained the plea, and adjudicated upon it, the case might have been different ; but it is clear that, in this case, the Court of Law has not entertained the question, and the bill was filed before the trial of the action.

The only remaining point, which was urged on the * part * 697 of the Stainbanks with reference to this agreement, was that it was made with the knowledge and privity of the plaintiff,

and was acquiesced in by him, in which case he would of course be debarred from the relief to which he claims to be entitled, in consequence of its having been entered into. The answer of the Stainbanks to the amended bill contains these passages: "And with reference to the 51st and following paragraphs of the plaintiff's amended bill, I say that shortly after the interview of the 19th of September, 1850, which took place at the plaintiff's office, as in the 80th paragraph of our former answer mentioned, the memorandum mentioned and set forth in the 52d paragraph of the plaintiff's amended bill was drawn up: and I further say, that on the 20th of September, 1850, being the day following the said interview, the said memorandum was read aloud by Daniel Davies the younger to the plaintiff for his approval in my presence, and the plaintiff then appeared to be, and I believe was, fully cognizant of the provisions thereof, and he had acquiesced in and assented to the same. . . . That when the said memorandum was read to the plaintiff as aforesaid, some conversation ensued as to B. Davies having to draw for money during the winter, whereupon the plaintiff said that the said B. Davies might draw upon some cousin of his; and I say, I had then with me a rough sheet of paper containing the calculations on which the said memorandum was founded, which was then shown by me to the plaintiff, and upon the plaintiff making such statement as last aforesaid, I then for my own guidance made a note in pencil on the back of the said rough sheet as follows, 'D. D. says he (meaning the defendant B. Davies) may draw upon his cousin for 100*l.* or 200*l.*'"

The question as to the plaintiff's knowledge and acquies-
 * 698 cence wholly depends upon the accuracy of the * statement thus contained in the answer. The plaintiff, both in his affidavits in the cause and upon his examination before us, has distinctly denied the truth of that statement. It is to be observed, that as to this statement the *onus probandi* rests upon the Stainbanks. It is the ground of their defence, and it is upon them to establish it. The question we have to consider is, whether they have done so or not. I am of opinion that they have failed to do so. [His Lordship proceeded to state the grounds on which he came to this conclusion.]

Upon the whole of the case my opinion is, that the plaintiff is entitled to a decree to have his name erased from the bills and

the money paid into Court repaid to him ; but having regard to the other parts of the case on which the plaintiff has failed, and, I must add, looking also to the affidavits which the plaintiff has filed with reference to those other parts of the case, I think that the decree should be without costs.

* *Ex parte* SAMUEL HAMMOND.

* 699

In the Matter of SAMUEL HAMMOND, a Bankrupt.

1855. January 22. Before the LORDS JUSTICES.

It is in general inexpedient to annex to a certificate a condition that it shall not afford protection against particular debts.¹

Accommodation bill transactions are not regarded with favour, and a bankrupt who has engaged in such dealings must expect them to be subjected to a rigid investigation ; but where such a bankrupt had not been shown to have been guilty of any dishonesty, or to have represented that the bills were not accommodation bills, the Court considered such transactions not sufficient ground for suspending the certificate for two years, without protection, as regarded liability in respect of the bills.²

THIS was the appeal of the bankrupt from an order of Mr. Commissioner AYRTON, suspending the bankrupt's certificate of conformity for two years, and granting it at the expiration of that period as of the third class, subject to a condition that it should not discharge the bankrupt from liability upon or in respect of certain accommodation bills, which the order specified.

The grounds of the commissioner's decision were, in substance, principally the following, as stated in his judgment.

The bankrupt commenced business, on his own account, at Leeds, as a flax spinner, in July, 1852, with a capital of about 9450*l*. He had previously carried on the same business there in partnership with his father. The balance sheet extended over a period two years only, viz., from July, 1852, to July, 1854. During that time the bankrupt's purchases amounted to 113,000*l*., and

¹ See *Ex parte* Anderton, 1 De G. & J. 298 ; *Ex parte* Harnden, 3 De G. & J. 489.

² See *Ex parte* Harrison, L. R. 2 Ch. Ap. 195.

his sales to about 98,000*l.* His actual profits were stated at about 8300*l.*, his trade expenses at 9194*l.*, and his household expenses 2335*l.* According to these statements of the balance sheet, the capital and profits being 12,000*l.*, and the expenses 11,000*l.* (in round numbers), there would be a surplus in the bankrupt's favour of upwards of 1000*l.* at the end of the second year of business. * But a further examination of the balance sheet disclosed a different state of circumstances, for to the trade expenses, amounting to 9914*l.*, and the household expenses, amounting to 2335*l.*, there must be added a gallery of pictures, costing 17,904*l.* Upon the mill there had also been expended 14,000*l.*, making in all an expenditure of 43,633*l.* during two years. Notwithstanding this expenditure, the assets to be divided under the bankruptcy were put down as worth no less than 27,669*l.* The question then arose, how did the bankrupt expend 43,000*l.*, and, nevertheless, have 27,000*l.* to be divided among his creditors? It was by running into debt. It was not easy to state the exact amount of debts which would be proved; but there appeared to be a deficiency of 20,000*l.* at the least, for 17,900*l.* of which the pictures accounted. But the profits being only 3375*l.*, whence did the bankrupt obtain the 17,900*l.* given for the pictures? The only source which could be discovered, was what must be termed the abominable system of accommodation bills. In less than two years the bankrupt had made himself liable, either as drawer, or indorser, or acceptor of accommodation bills amounting to 59,000*l.*, of which he estimated that 14,000*l.* would be proved against his estate. The bankrupt, in his balance sheet, stated the cause of his bankruptcy to be threefold: first, a heavy loss on the sale of his pictures; secondly, the stoppage of his mill by the explosion of a boiler; and, thirdly, that he had introduced new spinning machinery into the mill, which was incomplete when the explosion took place, which, with the stagnation of the flax trade, had, as the bankrupt stated, caused his fall. These circumstances, however, had not, in the opinion of the commissioner, caused the bankruptcy. It appeared to the commissioner to have been caused by a most reckless and extravagant expenditure of money upon the pictures, and a gallery to keep them in, and upon wine. * No less * than 1500*l.* had been expended in wine, and although that wine had sold well, yet in such cases the estimation of the act must not depend upon the result.

The accommodation bills to which the bankrupt had been a party were the following: Beckenbacks, 18,602*l.*; Lord, 16,254*l.*; Passavant, 18,987*l.*; De Bergue, 3138*l.*; and Hirsch, 3170*l.*; making together the enormous amount of 60,151*l.* So reckless was the bankrupt with regard to these transactions, that he did not know how much was running at one time; it might be, he said, 14,000*l.* at once. The whole of these bills constituted a system of cross-accommodation acceptances, popularly denominated kite flying. It was scarcely possible to exaggerate the mischief done to the mercantile community by these accommodation bills. Credit was the very life of commerce, and accommodation paper poisoned the sources of credit, by inducing suspicion and fear. Respectable bankers, on discovering that a customer dealt in accommodation bills, would insist on his closing his account. Such was their opinion of accommodation bills. Here the actual sales and purchases had amounted together to 200,000*l.*, so that the bankrupt could the more easily put this dishonest paper into circulation. He could (so to speak) slip in the bad bills amongst the good ones. Accommodation bills generally led to ruin; and, accordingly, of the six confederates mentioned in the balance sheet, the bankrupt and four others were already insolvent.

With regard to the pictures, the bulk of them, which had cost 14,577*l.*, were sold by auction for 8623*l.*, showing a loss of upwards of 6000*l.* One question in dispute had been, whether the bankrupt bought these pictures as a private gentleman, or whether they were purchased as a commercial speculation to sell again for *profit. It appeared from the evidence, that though *702 originally the bankrupt might have commenced his purchases with an intent to keep the pictures, he soon determined that they should become a mercantile speculation; and the commissioner was satisfied, that for eighteen months before the bankruptcy, the bankrupt was prepared to sell his pictures, or any of them. If the bankrupt had intended to keep these pictures, he would have been guilty of the most scandalous extravagance; but even viewing the transaction in its best light, that of a mercantile transaction, yet, as the pictures were not purchased with the bankrupt's own money, it was a speculation in the highest degree reckless and improper.

The points which the commissioner considered to be in the bankrupt's favour were, that there was no direct fraud, no offence

under any of the penal clauses, — that there was a large amount of assets to be divided, — that there had been no making away with, nor any sort of concealment of, property; but the commissioner, considering the accommodation bill transactions a systematic course of proceeding wholly beyond the pale of mercantile transactions, and considering the extravagances as next to fraud, thought it right to suspend the certificate for two years. So far, however, as the bankrupt's just debts were concerned, there appeared no reason why he should be thrown into prison for want of protection, which would be therefore granted during the two years so far as these just debts were concerned.

The commissioner concluded his judgment thus: "I shall annex to the certificate, which, when granted, will be of the third class, a condition that neither the bankrupt's person, nor his future acquired property, is to be protected against the claims of the holders of any of the bills drawn by the bankrupt upon and accepted by Beckenback, Lord, Passavant, De Bergue, or * 703 Hirsch, or * drawn by any of them upon and accepted or indorsed by the bankrupt." (a)

The following was the substance of the allegations in the petition of appeal, and affidavits in support of it.

At the sale of the bankrupt's pictures mentioned by the commissioner in his judgment, and which took place on the 17th of June, 1854, in London, through Messrs. Christie and Manson, the appellant, by the advice of his auctioneer, fixed no reserve bidding, and in consequence most unexpectedly sustained on such a loss of 5565*l.* 12*s.* 8*d.* Notwithstanding this loss, the appellant still considered himself solvent, and was still of opinion that if he could have continued to carry on business, and thus have avoided the very heavy sacrifice which invariably results from a forced sale of property, consisting principally of mills and machinery, he had sufficient assets left to enable him ultimately to pay every creditor in full. The appellant's ability to carry on business depended upon an arrangement with his bankers, whereby, according to the usual practice in the north of England, the appellant was allowed to overdraw his account. He was allowed to do so to an amount not exceeding 5000*l.*, and was also allowed credit in account with his bankers for the current acceptances of his customers, less the

(a) The order, however, was not in these terms, but in those stated at the commencement of this report.

usual bankers' charges from the date when such acceptances were paid in. On the 1st of July, 1854, however, the appellant, without any previous intimation of such an intention, received a notice from his bankers that all cash and bills paid in by him from that date would be placed to his account, and that no further advance would be allowed. At this time several of the appellant's acceptances were outstanding, and there were other payments to a considerable amount * which would fall due early in the * 704 month. The appellant also held the acceptances of other persons to a large amount (being part of the proceeds of the sale of the paintings), which he intended to have paid into his bankers' hands, and thus to have provided the funds required to meet his own engagements.

This notice from the bankers rendered it necessary for him either to raise money to meet his more urgent engagements, by a sacrifice of the property remaining in his hands, or to lay his affairs before his creditors. He chose the latter alternative, and forthwith instructed his solicitors to call a meeting of his creditors. An assignment was shortly afterwards prepared, and was executed by the appellant on the 27th of July. Afterwards, however, the appellant, fearing that his estate would not be realized and wound up to the best advantage under the assignment, requested his solicitors, who were creditors of his, to file a petition for adjudication of bankruptcy against him. They did so, and on the 3d of August, 1854, the adjudication took place.

As regarded the objections to the granting of the certificate, the petition and affidavit stated: That at the time when the appellant drew, indorsed, and accepted the several bills of exchange mentioned in the order, he had every reasonable ground to expect that he should have been able to meet such of the bills as were to be paid by him as they became due, and that the persons or firms named in the order would have been able to meet such of the bills as were to be paid by them, and that there was still every reason to believe that the holders of the bills would in every instance receive 20s. in the pound upon the amount thereof from the estates of one or other of the parties thereto. That with regard to the charge of extravagant expenditure, the appellant's principal expenditure consisted in laying in a stock of * wines, * 705 which would have lasted him for many years, and that his purchases had been so carefully made, that the sale by the as-

signees realized a larger sum of money than the stock had originally cost. The appellant also submitted that the expenditure of his establishment, after deducting the costs of the wine sold by the assignees, was not larger than was justifiable for a man with a family starting with an established business and a capital of 10,000*l.*, especially as the appellant was not in the habit of employing a traveller, but himself obtained orders for his yarns principally from customers who came to Leeds to make purchases, which devolved upon the appellant the necessity of frequently entertaining such customers at his own house. That with regard to the pictures, the appellant's expectation of deriving a profit by resale was founded upon the rule which he acted upon, of purchasing the works of eminent living artists, in the belief that, as the artists advanced in public estimation, their works would increase in value, and that, in the event of the death of any of them, a very large addition to the value of his works would take place. That with regard to the outlay in the improvement of his mills and machinery, that outlay was about 14,000*l.*, and the appellant was only prevented deriving the benefit of it by accidents which he could neither foresee nor control; for that in September, 1853, when the improvements made by the appellant were rapidly progressing towards completion, a boiler explosion took place.

Mr. Swanston and *Mr. Little*, in support of the appeal. — The accommodation bills, on account of which chiefly this severe sentence has been pronounced by the commissioner, were not dealt with, as the commissioner assumes, systematically, but merely to provide funds during the temporary suspension of the bank-
 * 706 rupt's profits caused * by the accident to his machinery and the outlay required for its repair. It was necessary to supply this chasm, and credit was obtained by means of the bills. There is no proof that any one was deceived or misled by them. All those with whom the bankrupt dealt were persons engaged in trade, and well aware that a bill of exchange is frequently accepted or indorsed by way of accommodation. They do not pretend that they were ignorant of the bills here having been of that description, or that, if they were, they would, on being apprised of the fact, have rejected them. What they regarded was, no doubt, the solvency of the persons whose names were on the bills, not the nature of the consideration for them, or whether it consisted

of goods or credit. In the result the bill-holders will not suffer. Accommodation bills are recognized by Courts of Equity, and are dealt with according to rules applicable to them, and not as fraudulent transactions. The dealing in pictures was resorted to for purposes of profit, and not of display or self-gratification, and the wine was necessarily purchased to enable the bankrupt to show the hospitality which was usual and proper in the course of his trade. The condition annexed to the certificate is at variance with the policy of the bankrupt laws, and there is no authority for it.

Mr. Bacon and *Mr. T. H. Terrell*, for the assignees, and *Mr. De Gex*, for creditors not holding accommodation acceptances, in support of the decision of the commissioner. — The *bonâ fide* creditors were injured by the admission to proof of debts founded on fictitious debts. In *Fentum v. Pocock*, (a) Mr. Justice HEATH said: "Whoever draws an accommodation bill, procures another to accept it, and negotiates it without letting the person to whom he passes it know it is an accommodation * bill, is, * 707 as I think, guilty of a gross fraud." It would be very prejudicial to the interests of commerce if this Court should throw any doubt on the justice of the commissioner's observations upon accommodation bills. It is said that the actual bill-holders will not lose, but other parties to the bills must do so. In *Ex parte Wilson*, (b) Lord ELDON reprobates the mischievous authenticity given to accommodation bills. With respect to the condition annexed to the certificate, it is not, as it has been said on the other side, without precedent, for in *Ex parte Wakefield* (c) a condition was annexed that the certificate should not discharge the bankrupt from any liabilities incurred by him as trustee or executor under certain specified wills.

They also referred to and commented on the following cases: *Ex parte Dornford*, (d) *Ex parte Johnson*, (e) *Ex parte Rufford*, (g) *Ex parte Manico*. (h)

(a) 5 Taunt. 192.

(b) 11 Ves. 410.

(c) 4 De G. & S. 18, but not reported on the application to recall the certificate.

(d) 4 De G. & S. 29.

(g) 2 De G., M. & G. 234.

(e) *Ibid.* 25.

(h) 3 De G., M. & G. 502; [note (1) and cases cited].

[The Lord Justice KNIGHT BRUCE sent for the order books containing the entries of *Ex parte Wakefield*, from which it appeared that, under the consent of the bankrupt on which the order of November 25th, 1850, was made, the certificate granted under that order was subsequently recalled, and another granted of the third class upon the condition mentioned in the argument. His Lordship said that he believed the latter order to have proceeded on the bankrupt's consent to the condition.]

Mr. Swanston, in reply.

THE LORD JUSTICE KNIGHT BRUCE. — The objections to the * 708 bankrupt's application in this * case are substantially reduced to three. The first is founded on the quantity of wine which he had bought and in part consumed, the second upon the unusual quantity of pictures which he had collected, and for the most part disposed of before the failure. The other matter is as to the accommodation bills.

The question with respect to the wine, which does not appear to have been bought injudiciously as to price, has been placed in two points of view, first, as exhibiting improper or careless expenditure, secondly, as evidence of extravagant habits in private life. The latter of these may be at once dismissed. The bankrupt's scale of living was liberal, but there appear to have been reasons for it connected with his business. There is no evidence that his mode of living was immoderate or extravagant, having regard to his explanation as to the necessity or prudence of keeping a table to which he might occasionally or frequently ask persons with whom he had dealings in the course of his trade. If that be so, then the first objection is reduced to the question of rash, improvident, and thoughtless expenditure; and in this respect I think that there is not a sufficient case made to affect the allowance of the certificate. The wine was not acquired merely for the indulgence of himself and his family, but for purposes connected with his business, as was done by others similarly situated. It seems to have been selected with judgment, for it was, as to so much as remained unconsumed, sold under the bankruptcy at a profit to the estate. I cannot, on this ground, impute to the bankrupt any gross or very considerable amount of extravagant or improvident expenditure.

Then as to the pictures, they were bought because, in the first

instance, the bankrupt was fond of art and believed that he understood it, but he bought them not *merely for the * 709 selfish indulgence of a particular taste or pursuit. He liked them, and took pleasure in his purchases, which he made, however, not for the purpose of retaining them, but in the hope and with the view of selling them again at a profit when an advantageous opportunity of doing so should occur. No doubt there was a certain degree of imprudence in thus acting, but I do not think that there was a sufficient departure from the right course to render necessary the severe sentence which has been pronounced by the learned commissioner, either with respect to the individual case or for the sake of example.

Then comes the third and last point, that, namely, relating to the accommodation bills; and unless it can be said that by the mere act of passing or depositing with a banker a bill of exchange, a person is to be considered as in effect declaring that it is not an accommodation bill, there is no case of fraud, misrepresentation, or concealment. Now I do not think that the mere circumstance of a man parting with a bill without saying that is an accommodation bill, amounts to an implied representation that it is not an accommodation bill. I am not aware of any sufficient reason or authority for so extensive a proposition. In this case all the names upon the bills were genuine, and, at the time, good. The bankrupt received accommodation, and, to a limited extent, gave it. The bills might and probably would all have been paid but for accidental failures on the part of other persons. It seems to me that there has been a total absence of falsehood and of dishonesty in the whole of the transactions. The case then is reduced to the question, whether the bankrupt in effect traded without sufficient means, and whether, by raising money on bills which were in effect accommodation bills, he represented his circumstances to be otherwise than they were. The *evidence does not * 710 appear to me to lead to these conclusions. I see no reason for disbelieving the bankrupt's statement, that, but for many unlucky circumstances, and the alterations which had taken place during the last year, and the resolution of the bankers to withdraw their accommodation, he would probably have still been a solvent and thriving man. With regard to the argument, that fictitious or erroneous credit is obtained by means of accommodation bills, I must think that every man of business is aware that a bill may

be an accommodation bill, that is to say, a bill accepted or indorsed for accommodation ; and if he will not ask the question and inform himself on the subject he must be taken to be indifferent to it. I am far from wishing to be understood as saying or intimating anything in favour of accommodation bills. On the contrary, whenever a bankrupt appears to have been engaged in such transactions, he must expect them to be subjected to a rigid investigation.

Looking at the special circumstances of this case, with great deference to the learned commissioner who has taken a different view of them, I think that there is no ground for imputing to the bankrupt more than a certain degree of imprudence ; and as, whatever respect we may entertain for the opinion of each learned commissioner, our duty is to exercise our own judgment, I must say that the ends of private and public justice will, in my opinion, be satisfied by suspending the certificate for one year, and then granting it of the second class.

THE LORD JUSTICE TURNER. — In this case there are two questions, one as to the condition annexed to the certificate, the other as to its suspension. The condition annexed to the certificate is

this : [His Lordship read it.] I think it unwise to annex
* 711 * such a condition as this to a bankrupt's certificate. The

necessary effect of doing so is, that when the bankrupt enters into trade again he labours under the burden of the debts which are undischarged by the certificate, and his former creditors may seize his after-acquired property, to the destruction of the remedy of his new creditors, with whom, by virtue of his certificate, he is empowered to deal, and who have trusted him on the faith of that certificate. The effect of the certificate is, I think, very much defeated by annexing such a condition to it. Looking, too, at the nature of the condition annexed to this certificate, it rather seems to me to go beyond the intention of the commissioner as expressed in his judgment. The commissioner's object, as I suspect, was that the bankrupt should have no protection against the claims of the *bonâ fide* holders of the bills, but the order as expressed does not seem to me to carry out that intention. If the object was only to deprive the bankrupt of protection against the claims of the *bonâ fide* holders, the condition would be of no great use, since it seems clear that these holders will be paid in full. But the condition goes farther, and subjects the bankrupt to all

liabilities in respect of the bills. It will operate for the benefit of the assignees of the persons who have been engaged in these very transactions which the commissioner considered so culpable. If there was to be any reservation, I think it should have been in favour of the other creditors, who are supposed to have been deceived by the appearance of false credit. I think, however, under the circumstances, and looking at the general policy of annexing conditions of this nature to certificates, such a condition ought not in this case to have been annexed.

We come, then, to the question of the suspension of the certificate for two years. Now, the Act of Parliament * enumerates a variety of offences which subject bankrupts to * 712 the refusal or suspension of their certificate, but it does not treat as an offence the dealing in accommodation bills. There may be many shades of distinction in such cases. There may be cases where the parties to such bills may know that they will not be met. There may be other cases where, under temporary pressure or without pressure, persons may become parties to such bills, fully expecting that when they become due the persons liable upon them will be able to answer the liability. I think, therefore, that any decision which applies the same principle to all accommodation bills must be founded in error. It is said that accommodation bills are productive of great mischief, and no doubt they are attended with danger, but to say that in all cases a man dealing in accommodation bills is committing an offence against credit or trade is, I think, carrying the doctrine too far. The mischief which is said to arise from dealing in accommodation bills is, that such dealings convey to the public a false impression of the trader's wealth. But the public know the ordinary course of trade, and persons who deal in bills generally, as I believe, take them on the credit of the persons whose names are upon the bills, and who are liable in respect of them. They do not, I think, ordinarily inquire whether the bills are accommodation bills or not. So far, indeed, as my experience extends, this is an inquiry very generally avoided; and with respect to the impression of wealth which such dealings are said to import, it seems to me that the public is equally damaged whether the trading is carried on by borrowed capital, or by money raised by means of accommodation bills. If a man carries on trade by means of accommodation bills, he trades beyond his means, and this no doubt is reprehensible; and if at the time

he knows or suspects that the bills will not be answered when
 * 713 due, his conduct may amount to fraud ; but, in the * absence
 of any such knowledge or suspicion, such cases as these
 ought, I think, to be looked at rather as cases of over-trading than
 in the more extended view, which the learned commissioner has
 taken. So as to the pictures, I think it clear that the dealing, if
 not commenced, was at least continued for purposes of profit, and
 not for the bankrupt's own amusement or gratification. I think
 that this was also a question as to the extent of the dealings.
 The same may be said as to the wine.

On the whole there appears to me to have been in the bankrupt's
 conduct a degree of imprudence which cannot be justified, but no
 dishonesty. There are circumstances also in his favour, such as
 the regular keeping of accounts, the absence of fraud and of any
 offence against the bankrupt laws. It appears to me that the sus-
 pension for a year will be sufficient to satisfy the justice of the
 case, and that the certificate should be of the second class and not
 of the third, for I think the bankruptcy in some degree at least
 attributable to accident and misfortune. I think, too, the condi-
 tion annexed to the certificate should be struck out. I do not con-
 sider that we are interfering with the discretion of the commissioner.
 We only differ from him in the view which he has taken of the bill
 transactions.

The costs of the assignees and those of the opposing creditors
 (to the extent of 20*l.*) were ordered to be paid out of the estate.

* 714

* *Ex parte* HENRY LITTLEDALE.

In the Matter of HENRY PEARSE, a Bankrupt. (a)

1855. February 24, 28. Before the Lord Chancellor Lord CRANWORTH and
 the LORDS JUSTICES.

In 1846, L. lent a sum of money to P., to enable him to purchase the requisite
 amount of shares in two public companies to qualify him for the office of

(a) This case was heard before the full Court, at the suggestion of the Lords
 Justices, in consequence of its importance and of the conflicting state of the
 authorities on the question.

director in each, and P. assigned the shares in both the companies in which he had become director, to L., as a security for the loan. The qualification for the office of director in one of the companies, which was constituted by Act of Parliament, would have been lost by the disposal or reduction of the amount of that qualification, and the provisions of the deed by which the other company was constituted required that its directors should be possessed of or entitled to the requisite amount of shares in their own right. In June, 1854, P. signed a declaration of insolvency, upon which he was adjudicated a bankrupt, the shares then standing in his name, but five days previously L. gave notice to the directors of both companies of the assignment to him. At the time of his bankruptcy P. was actually a director of one of the companies, and out of office by rotation in the other, in which he probably would have been re-elected: *Held*, that the shares in neither company were in the possession, order, or disposition of P. at the time of his bankruptcy, with the consent of the true owner.¹

THIS was a petition by way of appeal from the decision of Mr. Commissioner GOULBURN, dismissing the petition which was originally presented, for the purpose of having a declaration that the petitioner was a mortgagee of certain dock and insurance shares, the property of and standing in the name of the bankrupt at the date of his bankruptcy, and for the usual accounts and order for sale.

The following are the facts of the case:

In April, 1846, Mr. Littledale, the petitioner, lent the bankrupt the sum of 2500*l.*, to secure the repayment of which the bankrupt executed a bond, bearing date the 14th April, 1846, for the sum of 5000*l.*, conditioned for the payment to the petitioner of 2500*l.*, with interest at 5*l.* per cent per annum. As a further security, by indenture, bearing date the 14th April, 1846, made between the bankrupt and the petitioner, after reciting that the *bankrupt was absolutely possessed of 2000*l.* East and *715 West India Dock stock, and 1000*l.* Imperial Fire Insurance stock, and that the same sums were then standing in his, the bankrupt's, name in the books of the respective companies, and reciting that the bankrupt, having occasion for the sum of 2500*l.*, had applied to and requested the petitioner to lend him the same, which the petitioner agreed to do, upon having the same secured by an assignment of the said stocks in manner thereafter contained: It was witnessed that, in consideration of the sum of 2500*l.* to the bankrupt, paid by the petitioner, the receipt

¹ See *Ex parte Boulton*, 1 De G. & J. 163, 179.

of which the bankrupt did thereby acknowledge, the bankrupt did grant, bargain, sell, and assign unto the petitioner, his executors, administrators, and assigns, all those the said sums of 2000*l.* East and West India Dock stock, and 1000*l.* Imperial Fire Insurance stock, and the dividends, interest, and annual produce thereof, and all the right, title, and interest, property, benefit, claim, and demand whatsoever, both at law and in equity, of him the bankrupt, of, in, to, from, or out of the same respectively, and every part thereof, to hold, receive, and take the said stocks thereby assigned to the petitioner, his executors, administrators, and assigns, subject to the proviso or condition for redemption thereafter contained. And for the better and more effectually enabling the petitioner, his executors, administrators, and assigns, to recover and receive the same stocks, the bankrupt did thereby give and grant unto the petitioner, his executors, administrators, and assigns, the full and whole power and authority of him, the bankrupt, to sell, assign, and transfer all and every part of the said stocks, and to receive all dividends due and to grow due thereon, and to use the name and names of him the said bankrupt, his executors and administrators, in and about all actions and suits, receipts, releases, accounts, reckonings, and other matters

*716 and things relating thereto, and did thereby * undertake and agree to ratify, confirm, and allow, to be valid and sufficiently effectual and available, to all intents and purposes whatsoever, all and whatsoever the petitioner, his executors, administrators, and assigns, should lawfully do or cause to be done in and about the premises by virtue of those presents. And it was further provided that, if the bankrupt should pay unto the petitioner the full sum of 2500*l.* on the 1st October then next ensuing, and should in the mean time pay unto the petitioner interest for the 2500*l.* at the rate of 5*l.* for 100*l.* for a year, by equal half-yearly payments on the 1st October and the 1st April in each year, then and in that case, and immediately after such payments, those presents and the assignments thereby made should cease, determine, and be void. And it was further provided, that if default should be made in payment of the sum of 2500*l.*, or any part thereof, or of the interest for the same, or any part thereof, on or at the days thereinbefore appointed for payment of the same, and after one calendar month should have expired after notice in writing, demanding payment of the principal sum and interest, or of so much thereof as should

then remain due, should have been delivered to the bankrupt, or left at his usual or last known place of residence, then and in any or either of the said cases, and either immediately or at any time thereafter, it should be lawful for the petitioner, and he was thereby fully authorized and empowered, without any further consent or concurrence of the bankrupt, to make sale and dispose of the aforesaid sums of stock, or either of them, or any part or parts of the same respectively, and the dividends, income, and interest thereof respectively, either by public auction or private contract, as he should think fit, and to assign and assure the same to the purchaser or purchasers thereof: and that the petitioner, his executors, administrators, and assigns, should stand and be possessed of the moneys to arise * from such sale or sales as * 717 aforesaid, upon trust to retain and pay unto or for the petitioner, his executors, administrators, or assigns, the principal sum of 2500*l.*, and all interest due thereon, and to pay the residue or surplus unto the bankrupt, his executors, administrators, and assigns: and it was thereby agreed and declared, that the receipt or receipts of the petitioner, his executors, administrators, or assigns, for all money, dividends, interest, or income, payable under or by virtue of those presents, should, to all intents, discharge the purchaser or other person paying the money thereby acknowledged or expressed to be received from all liability. And by the same indenture, the bankrupt covenanted with the petitioner, that he, the said bankrupt, would pay to the petitioner the principal sum of 2500*l.*, and the interest thereof at the rate aforesaid, on or at the days or times thereinbefore appointed for payment of the same; and also that he then had full power and authority to assign the said several sums of stock respectively assigned to the petitioner in manner aforesaid, and that free and clear of and from all former and other assignments, liens, charges, and incumbrances whatsoever; and also that it should be lawful for the petitioner to have, hold, receive, take, and enjoy the said respective sums of stock thereby assigned, without any let, suit, interruption, or denial of, from, or by him, the bankrupt, or any other person; and further, that he, the bankrupt, should not at any time during the continuance of the said debt of 2500*l.*, or of any part thereof, or of any interest for the same on that security, without the consent in writing of the petitioner for that purpose first had and obtained, sell, assign, transfer, or otherwise dispose of, charge, or incumber

all or any part of the said stocks thereby assigned, or intended so to be, nor without such consent revoke or countermand all or any of the powers and authorities thereinbefore contained and * 718 given to the petitioner; * and, lastly, the bankrupt covenanted with the petitioner, his executors, administrators, and assigns, for further assurance to the petitioner of the said sums of stock and premises, and all dividends and interest arising from the same respectively.

At the time the bankrupt executed the indenture of assignment, he was a director of the East and West India Dock Company, and also of the Imperial Fire Insurance Company.

On the 9th June, 1854, the petitioner caused the following written notice to be given to the directors of the East and West India Dock Company: "Gentlemen,—I beg to apprise you that Mr. Henry Pearse has assigned to me 2000*l.* East and West India Dock stock standing in his name, and I desire you to hold the same subject to my order. I am, gentlemen, &c., HENRY LITTLEDALE. London, 9th June, 1854." On the same day, Mr. Littledale sent a similar notice to the directors of the Imperial Fire Insurance Company with respect to the stock of that company standing in the bankrupt's name.

The petition alleged that on the 9th June, 1854, when such notices were respectively delivered, the bankrupt had not committed any act of bankruptcy. On the 14th June, 1854, the bankrupt signed a declaration of insolvency, which was filed in the Court of Bankruptcy on the 17th June, 1854, and was the act of bankruptcy upon which the bankrupt was afterwards adjudicated bankrupt. The capital of the Imperial Fire Insurance Company was not represented by stock, but by shares of 500*l.* each, upon each of which shares the sum of 50*l.* only was then paid up. The bankrupt, at the time he executed the indenture of assignment, and also when he was adjudicated a bankrupt, was the registered proprietor of six of such shares, and from the time of his becoming a * 719 member of the * Imperial Fire Insurance Company, the bankrupt never had any greater or less number of shares than those six shares; and it was established by the evidence of the petitioner and of the bankrupt, that, although by the indenture of assignment the bankrupt purported to assign to the petitioner the sum of 1000*l.* Imperial Fire Insurance stock, it was meant and intended as well by the petitioner, as by the bankrupt, that he

should assign to the petitioner the above-mentioned six shares in such Insurance Company.

On the day after the receipt of the formal notice, which was served upon the Dock Company by the petitioner, the chairman of the company wrote the following letter to the bankrupt: "Dock House, Billiter Square, 10 June, 1854. My dear Pearse,— On calling here to-day, I find a notice from Mr. Henry Littledale, desiring the East and West India Dock Company to hold 2000*l.* stock standing in your name subject to his order, and I think it right to inform you of this before our secretary gives any answer. You are aware that nothing but an actual transfer will give Mr. Littledale a valid hold on this stock, and that such transfer would disqualify you from re-election next month. Let me hear your wishes, and believe me, &c., ROBERT HAWTHORN." The bankrupt took no notice of this communication.

It was in evidence that in July, 1853, he went by rotation out of office as director of the Dock Company, and that he remained out of such office till the time of his bankruptcy. It was also in evidence that he had not attended any meeting of the directors of the Imperial Fire Insurance Company, or assumed to act as a director thereof, after the 9th June, 1854; but he was up to that day in office as a director of that company.

The following affidavit of Mr. James W. Freshfield, * the * 720 solicitor for the assignees, was relied upon by them in support of the decision of the commissioner:—

"At the end of May and the beginning of June, 1854, I was consulted by the bankrupt and his friends on his affairs. I was informed by the bankrupt that proceedings at law were pending against him to recover a sum of 2000*l.* or thereabouts, which he could not pay; that he owed other large debts beyond his means of payment, and that it must therefore be decided whether his friends would assist him, and provide the funds for liquidating his debts, as otherwise he must declare himself a bankrupt. On the 9th of June, 1854, a meeting was held, at which Mr. Charles Pearse, the bankrupt's brother, and Mr. Henry Littledale, were present, when the affairs of the bankrupt were fully discussed. The said Henry Littledale wished at that time to defer giving notice of the security he held over the shares in the Dock Company and the Imperial Insurance Company mentioned in his affidavit,

in order that the bankrupt might retain his position as a director in those companies, which he could not if notice of the assignment was given ; but on the result of the meeting it was decided that it was not possible to avoid bankruptcy, and thereupon, and after such decision, he on the same day gave notice of his claim as assignee of such shares to the East and West India Dock Company and the Imperial Fire Insurance Company. The act of bankruptcy, upon which the petition for adjudication proceeded, was a declaration of insolvency, which was signed by the bankrupt on the 14th of June last at two o'clock in the afternoon, and such declaration was filed in this Court on the 17th of June last."

* 721 The following sections of the Act constituting the * Dock Company and clauses of the Insurance Company's deed of settlement were referred to during the argument before the commissioner and on the appeal.

By the 12th section of the Act 1 & 2 Will. 4, c. 52, incorporating the Dock Company, the shares are declared to be personal estate. The 14th section provides the mode of transferring shares to be by entry and registration in the books of the company, "which entry shall be signed by the parties making such assignments or transfers, or their attorneys thereunto duly authorized; and until such transfer shall have been made and entered as aforesaid, no purchaser or other person shall be considered a member of the said company, nor have a vote as a proprietor in respect of such stock." By the 20th section, no proprietor can vote at a meeting unless possessed of the stock standing in his name in his own right, and previously to voting he may be called upon to swear that the stock was held by him free from all incumbrances. The 24th section states the qualification for a director to be the possession of 2000*l.* stock of the company ; and it provides that if any director or directors shall die, resign, be removed, or dispose of his, her, or their interest in the said stock, so as to reduce the same respectively under the said sum of 2000*l.*, then and in any such case it shall and may be lawful to and for the next general or special meeting of the said company to nominate and appoint by ballot, by and out of the proprietors of the said company who shall respectively be possessed of at least 2000*l.* of the capital stock of the said company, a new director.

The 33d clause of the Imperial Fire Insurance Company's deed of settlement provides, that if any person who shall be elected a director, trustee, or auditor of this company shall, during his continuance in office, * cease to be possessed of and * 722 entitled in his own right to six shares, or 3000*l.* at the least of the capital stock of the said company, his office shall immediately thereupon become vacant. The 43d clause provides that if any member shall be desirous of selling his or her share or shares of the capital of the company, he or she shall notify the same to the court of directors by some writing under his or her hand, containing the name, residence, and quality of the person to whom he or she proposes selling the same; and if the court of directors think it advisable that the same should be purchased on the account of the company, the court of directors shall, within fifteen days after receiving such notification, signify to the member proposing such sale their intention of being the purchasers thereof for the company, and shall thereupon fix a fair and just value upon the same, due regard being had to the state of the concerns of the company, and the member proposing such sale shall be bound by the said valuation; and immediately on the payment to him or her of the money at which his or her said share or shares shall be valued, the said share or shares so valued and paid for shall become the property of the company, and be transferred by the vendor to such four of the trustees of the said company as the court of directors shall for that purpose nominate, and such share or shares shall be sold and disposed of or retained for the benefit of the company as the court of directors shall think proper; and if the court of directors shall decline to become the purchasers of any such share or shares, they shall, within the said space of fifteen days, signify to the member so proposing to sell his or her share or shares whether the said court of directors do or do not consent to the sale thereof to the person proposed to be the purchaser thereof; and unless the said court of directors shall consent to the sale thereof no sale of the same shall be valid; and if they consent to * the sale thereof, the transfer of the same * 723 shall be made at the expense of the purchaser by a deed of sale and covenant in the form prescribed for that purpose in the schedule to these presents.

The learned commissioner gave a very elaborate judgment, holding that Mr. Littledale had no lien either upon the shares of the

bankrupt in the East and West India Dock Company or in the Insurance Company, and dismissed the petition, but without costs, in consequence of the decision in the case of *Ex parte Masterman*. (a) From that judgment of the commissioner Mr. Littledale now appealed.

Mr. Bacon and *Mr. Bagley*, for the petitioner, in support of the appeal. — We submit that the present case is to be governed by the case of *Ex parte Masterman*, (a) and is distinguishable from that of *Ex parte The Lancaster Canal Company*, (b) inasmuch as there Lord LYNDHURST held it to be the intent of the parties that the bankrupt should continue reputed owner of the shares in question, and no entry of the transfer was made in any book, which made out a case of collusion and fraud, and created that reputation of ownership which the 72d section of the Act 6 Geo. 4, c. 16, was intended to prevent. There was, in fact, no notice in that case, because the assignor and assignee were the only parties concerned; but even assuming that there was a notice, still, according to Lord LYNDHURST's judgment, there was no intention to change the ownership up to the time of the bankruptcy. [LORD JUSTICE TURNER. — There was a notice, but there was an agreement that there was to be no charge until default, and the bankruptcy occurred before default.] The particu-

* 724 lar forms prescribed for the transfer * of the shares in either of these companies have nothing to do with the equity here insisted upon; nor was the qualification for the office of director in either company impaired or affected until the date when the notice was served: at that time he ceased to be qualified, and the petitioner's inchoate right was perfected. We submit that this was not within the mischief intended to be provided against by the Act 12 & 13 Vict. c. 106, being a *bonâ fide* transaction entered into and completed without notice before the adjudication of bankruptcy.

They also referred to *Re Styant*, (c) *Ex parte Pooley*, (d) *The Queen v. Wing*, (e) *Fawcett v. Fearne*, (g) *Belcher v. Bellamy*, (h) *Price v. Groom*. (i)

(a) 2 Mont. & Ayr. 209.

(b) Mont. & B. 94.

(c) 2 M., D. & D. 219.

(d) *Ibid.* 505.

(e) 17 Q. B. 645.

(g) 6 Q. B. 20.

(h) 2 Exch. 303.

(i) 2 Exch. 542.

Mr. Selwyn and *Mr. Coleridge*, for the assignees, in support of the commissioner's decision. — The transfer of the stock not having been completed according to the formalities prescribed by the Act of Parliament and deed by which the companies were respectively incorporated, the transaction was *ex concessis* one which was ineffectual to confer a legal interest or to create a trust in equity, and at most it only amounted to an imperfect agreement to transfer, and nothing actually passing by it, it clearly is not therefore such an agreement as a Court of Equity would decree specific performance of: *Mortlock v. Buller*, (a) *Bellringer v. Blagrove*, (b) *Thompson v. Blackstone*; (c) but even if it was such an agreement, still we say that the circumstances were such as to make it a case of reputed ownership within the 125th section of the Bankrupt Law Consolidation Act, 12 & 13 * Vict. c. 106, the shares remaining in the order and disposition of the bankrupt at the time of his bankruptcy; and the notice having been given on the very eve of bankruptcy, the transaction amounted clearly to a fraudulent preference within the express provision of the 133d section of the same Act. The distinction between the present and the cases of *Re Styan*, (d) *Ex parte Pooley*, (e) and *Belcher v. Bellamy*, (g) *Price v. Groom*, (h) is, that, in each of those cases, the utmost had been done by the creditor to perfect his title, whereas, in the present case, there has been a studious design not to complete his security. [They referred to *Ex parte Nutting*, (i) *Nelson v. The London Assurance Company*, (k) *Ex parte Lawrence*, (l) *Ex parte Vallance*, (m) and they relied upon the authority of *Ex parte The Lancaster Canal Company*. (n)]

Mr. Bagley, in reply.

THE LORD CHANCELLOR. — This case lies in a narrow compass. The question is, whether or not *Mr. Littledale* is entitled to these dock and insurance shares against the general creditors of *Mr. Pearse*. There may perhaps be a distinction (though I confess, in

(a) 10 Ves. 292.

(b) 1 De G. & S. 63.

(c) 6 Beav. 470.

(d) 2 M., D. & D. 219.

(e) *Ibid.* 505.

(g) 2 Exch. 303.

(h) *Ibid.* 542.

(i) 2 M., D. & D. 302.

(k) 2 S. & S. 292.

(l) 1 De G. 269.

(m) 2 Deac. 354.

(n) Mont. & B. 94.

the opinion I have formed, there is none) between the case of the dock shares and that of the insurance shares, inasmuch as at the time of the bankruptcy Mr. Pearse was not actually a director of the Dock Company, though he was a director of the Insurance

Company, and if the right therefore turns upon the fact of
* 726 his being or not being a director, the result might be * dif-

ferent as to the two kinds of shares. The question as to the dock shares is of importance to the parties, while the value of the insurance shares is comparatively trifling. This, however, would not absolve the Court from the necessity of adjudicating, and I therefore feel bound to say I do not think the case turns upon the fact of Mr. Pearse being a director or not. I think it is clear that he must be treated as not having been at the time of his bankruptcy a director of the Dock Company, because although it is said that it is the custom to re-elect directors who go out under the Act of Parliament, and who are obliged to go out to purge themselves as it were by discontinuance of the office, and although it is the custom to re-elect them, it is obvious that the ex-directors have no more right to be re-elected than any other shareholders of the company. Therefore I think he must be treated as having ceased to be a director of the Dock Company.

The line of argument adopted by the counsel for the assignees may be divided into several heads: First, with respect to the general question, it was argued that in the case of this description of shares, there is not by virtue of an assignment, such as was here executed, any equitable right whatsoever given to the party to whom the assignment purports to have been made; that the Act of Parliament says that the transfer of these shares shall be made in a particular way only, and therefore that an assignment made as this was made (independently of the questions of whether or not he was a director or of public policy) gives no right at all. Now, I cannot for a moment yield to that argument. It is true that the Act of Parliament points out a particular mode in which (and in which only, if you please) transfers can properly be made (that is,

legal transfers), just in the same way as by the common
* 727 law of the land transfers of land can only be * made by particular forms and a particular course of proceeding. I see no difference whatever between an Act of Parliament which says, the transfer (that is, the legal transfer) shall be made in a particular way, and in a particular way only, and the doctrine of

common law, which says that land shall be transferred in a particular way, and in a particular way only. I think, therefore, that on that general question, it is quite impossible that the argument can for a moment be sustained. In the case, to which we were referred by the appellant's counsel, of *Ex parte Masterman*, (a) that point was expressly decided by the Court of review on grounds stated in the judgment of Mr. Justice ERSKINE (then Chief Judge), which appears to me quite unanswerable. I think, therefore, it must be assumed that the assignment did not transfer, but only operated as an agreement to transfer. If the argument on the part of the assignees rested upon the invalidity of such an agreement, I think it would be wholly untenable; but it was also urged, and with more plausibility at least, if not more weight, that the Act of Parliament in the case of the Dock Company, and the deed of partnership in that of the Insurance Company (which is a partnership constituted not by Act of Parliament, but by deed), it was provided that every director, in order to be a director, must be possessed in his own right of a certain quantity of stock or shares in the respective companies. The requisite quantity of stock in the Dock Company for the qualification of a director is 2000*l*. Mr. Pearse had 2000*l*. dock stock, and no more; and therefore it was said, when he agreed to assign to Mr. Littledale, and executed the instrument by way of security, so as to give Mr. Littledale a right as against Mr. Pearse, it was a fraud on the part of Mr. Littledale, by neglecting to give notice to have a transfer

* legally effected, to let Mr. Pearse remain the apparent * 728 owner of this property, though he was not the real owner, because the Act of Parliament declares that, unless he is the real owner, he cannot even vote as a proprietor, and that if he reduces his qualification he must cease to hold the office of a director.

Now, in the first place, although it must be clearly inferred that Mr. Littledale abstained from giving notice with a view to let Mr. Pearse remain as a director, yet I do not find that there was any contract of that kind; there was no contract that he should not give notice, and that he should not therefore disqualify Mr. Pearse. All Mr. Littledale seems to me to have done was this: He took an assignment which was not complete, so as to give him a complete equitable title until he had given a certain notice

(a) Mont. & Ayr. 209.

to the company. When he had given that notice, the director would cease to have that which he must have in order to be a qualified director. If Mr. Littledale, therefore, had contracted not to give such notice, the case might have been different. But Mr. Littledale, willing to oblige Mr. Pearse, and not looking at the transaction in the light in which it might possibly be regarded in a Court of Equity (though without moral delinquency), meant to say only, "I shall be satisfied with getting an assignment, taking my own time for giving notice." That being so, he took an assignment, which gave him an imperfect title, but with the means in his own hands of making that title perfect whenever he might think fit to do so. The moment he chose to do so, he deprived Mr. Pearse of his position as director ; and having that right, he gave the notice on the 9th of June, and it appears to me that on that day his title was complete.

The arguments against the validity of the notice were
 * 729 * partly derived from considerations of the Bankrupt Act, and partly also from considerations of public policy. It was said that the directors had public duties to perform, and looking at the Act of Parliament, I think that if this was a fraudulent contrivance as against that Act of Parliament, even if there were no bankruptcy at all, it would have been a contract, which neither this Court nor a Court of Law would have recognized ; but I cannot think that there was any contract to avoid the Act of Parliament, but a contract to do something which, when complete, would be perfectly good, notwithstanding the Act of Parliament, — the party choosing to exercise his own discretion as to the time when he should complete his title. Apply this test : Notice was given on the 9th of June, 1854. The act of bankruptcy was inchoate on the 14th, and completed on the 17th June. Suppose, instead of an act of bankruptcy on the 14th, Mr. Pearse had died on the 14th, can there be the least doubt that as against his executors Mr. Littledale would have had a perfect title ? He would not have had a good title if the whole was a fraud ; in which case the transaction could not have been enforced or recognized ; but I assume that he clearly would have had such a title, and this is one mode of arriving at the conclusion that it was not a fraud. The same question may be put in different shapes ; but the illustration I have suggested seems to me to be sufficient with reference to the consideration of the case independently of the bankruptcy.

It was urged, however, that bankruptcy makes a difference, because then, by the operation of the bankrupt laws, the question of order and disposition arises. But the answer which has been given to that is perfectly satisfactory to my mind; namely, that there must be two things in order to bring a case within that clause of the Act of Parliament: the property must have been in the order * and disposition of the bankrupt at the * 730 time of the bankruptcy, which, I take it, in the present case would be the 17th of June (that is, a time subsequent to the notice), with the consent of the true owner (that is, with the consent of Mr. Littledale). Now, these shares were not in the order and disposition of the bankrupt, because notice had been given to the company some days before the act of bankruptcy took place; and whether the company had perfected Mr. Littledale's title or not, I do not think material, because if they had improperly left the shares in the order and disposition of the bankrupt, by not making any entry of the notice given to them, still it cannot be said that the shares were in the order and disposition of the bankrupt with the consent of the true owner, for the true owner had done all that in him lay to prevent their being in the order and disposition of the bankrupt. I do not think, therefore, that the supervening bankruptcy at all alters the case.

The case which was mainly relied on by the respondent, of *Ex parte The Lancaster Canal Company*, (a) differs from the present in this material particular, that there the chief question was, whether it was real or personal estate, but when it turned out to be personal estate, the point was, whether it was in the order and disposition of the bankrupt, and there it was clear that no notice had been given up to the time of the bankruptcy, and, accordingly, the property was held to have been in the order and disposition of the bankrupt. That case seems to me to be distinguishable on that broad ground from the present, and therefore, in my opinion, the judgment of the learned commissioner was erroneous, and must be reversed.

It appears to me that there was no difference between the shares in the two companies. I have said that I * think * 731 the moment the notice was given every thing was complete, and it was immaterial whether the bankrupt was a director or not.

(a) Mont. & B. 94.

The case may be rather more clear with regard to the Dock Company shares, but in my opinion the same principle applies both to one case and to the other.

THE LORD JUSTICE KNIGHT BRUCE. — How this case would have stood with regard to the dock shares if Mr. Littledale had been proved to have precluded himself, or to have professed to preclude himself, from giving notice to the Dock Company, or its directors, or any of them, I need not say. For in my opinion that case is not proved against Mr. Littledale. It ought, I think, to be inferred that, as between him and Mr. Pearse, it was to be, and in every sense always was, in the power of Mr. Littledale to give notice when he should think fit to do so, by whatever feelings of friendship, kindness, or consideration he might have been actuated in delaying to give that notice. Again, I need not say how the case would have stood in my judgment as to those shares, if Mr. Pearse had been a director of the Dock Company in the month of June, 1854; for, as I understand the facts, he was not in any sense a director of that company during any portion of the month of June, 1854. It seems to me that there was nothing against public policy in the contract between the two gentlemen, and that at the time of the bankruptcy this property was not in the order and disposition of Mr. Pearse, the bankrupt. Upon that point, therefore, I differ respectfully from the learned commissioner.

Upon the minor question (minor in point of value, and * 732 perhaps minor otherwise), as to the insurance shares, I * have considerable doubt; but, as the Lord Chancellor and the Lord Justice have not any doubt upon that part of the case, I requested that the decision might not be delayed (unless they should wish it, which they did not) on account of the hesitation I feel so far, — a hesitation grounded upon this, that down to the time of the bankruptcy, and at the time of the bankruptcy, Mr. Pearse was actually in every sense a director of the company, which he could not have been without being the owner *bonâ fide* really and truly of these shares. I doubt, therefore, whether this was not tantamount to a declaration to the whole world, in which Mr. Littledale must be taken to have concurred, that Mr. Pearse was the owner in every sense of the shares. I doubt, therefore, whether, at the time of the bankruptcy with regard to the insurance shares, Mr. Pearse had not them in his possession by the consent

and permission of Mr. Littledale, and was not then the reputed owner of them. I am not sure that I have formed definitely an opinion upon this point. Certainly, at present, I entertain too much doubt upon it to enable me to say that, as to this part of the case, I can dissent from the learned commissioner. The united opinion, however, of the Lord Chancellor and the Lord Justice of course decides it, and the judgment must be for the appellant.

THE LORD JUSTICE TURNER. — Several points have been argued in this case: first, that the agreement between Mr. Pearse and Mr. Littledale was such as could not have been enforced in a Court of Equity, independently of any question of order and disposition; secondly, that the shares ought to be considered to have been in the order and disposition of the bankrupt at the time of his bankruptcy; and, thirdly, * that, failing the point of order * 733 and disposition, there is a case amounting to fraudulent preference.

On the last question of fraudulent preference little has been said in argument, and I think little could be said upon it. I think it quite clear that there has been no connivance or collusion on the part of the bankrupt, amounting to fraudulent preference on his part. The question, therefore, in my view, depends upon the first two points, — whether the agreement here was such as could be enforced in a Court of Equity, independently of the question of order and disposition; and, secondly, whether the case falls within the section of the Bankrupt Act, with relation to order and disposition.

As I understand the transaction between the parties, it was simply this: Mr. Littledale took a security upon the shares of Mr. Pearse in companies of which he was a director. He gave no immediate notice of that security. It was competent to him upon the contract to give notice of the security at any time when he thought proper to do so. There was no binding contract which restrained him from giving notice whenever he might think right to do so. The effect of his giving the notice would be at once to determine Mr. Pearse's position as a director of these companies. Under the circumstances of this case, it does not seem to me that if, instantly upon the notice being given by Mr. Littledale, a bill had been filed in a Court of Equity against Mr. Pearse, to compel him to perfect the legal title to that property which had been

equitably transferred by the contract of the parties, it would have been competent to Mr. Pearse to resist the performance of that contract, by the transfer of the legal property, upon the ground that there had been a fraudulent intention on the part of

* 734 Mr. * Littledale to defeat the provisions of the Acts of Parliament. The objection founded upon public policy appears to me to be untenable as to the East and West India Dock shares, because at the period when the notice was given, Mr. Pearse did not stand in the position of a director of the company; and, as to the Imperial Life shares, because I do not see that there was, with respect to them, any thing more than a contract between individuals, or any question of public policy at all. The latter company was not established, as I understand it, under any Act of Parliament imposing upon the directors duties involving any principle of public policy. I think, therefore, that the question of public policy is out of the case.

The question, therefore, must, as it seems to me, depend on the point of order and disposition. Now the Act of Parliament says, that in order to constitute a case of order and disposition, the bankrupt must, by the consent of the true owner, have in his possession, order, or disposition, goods or chattels, whereof he was reputed owner; and it does not seem to me, that under the provisions of that section, it can be said that a man is in possession of property, with the consent of the true owner, when the true owner has taken every step which it is in his power to take for the purpose of divesting the property from the person who becomes bankrupt. It seems to me, that the effect of the notice given to the companies, was to take away from Mr. Pearse the capacity of dealing with these shares. That was done at the instance of the person who had the security upon the shares, and who had become the true owner of them; and, therefore, there cannot, as I think, be said to be a holding of the possession of those shares by the bankrupt, with the consent of the true owner.

* 735 * Some cases were cited in the course of the argument, which, perhaps, it may be material to distinguish from the present. I refer particularly to the case of *Re Dilworth*, (a) and the case of *Nelson v. The London Assurance Company*. (b) The case of *Re Dilworth*, at first sight, appears to have some bearing

(a) Mont. & Bl. 94-113; 1 D. & C. 411.

(b) 2 Sim. & S. 292.

upon the question before us, but on looking at that case, I see that what Lord LYNDHURST said was this: "In this case the provisions of the Act of Parliament were not complied with; an instrument of transfer alone was executed, and that was delivered to the clerk. No duplicate was executed, nor entry made of the execution of the transfer, agreeably with the provisions of the Act of Parliament. No entry whatever was made indicating that Dilworth had ceased to be a proprietor; and it is quite obvious, as I collect from the transaction, that it never was intended that he should cease to be the apparent proprietor; it was intended that this should be a mere security in the hands of the company, to be made use of in case of default of the treasurer, and not otherwise." The intention of the security, therefore, in *Dilworth's Case* was this, that in the event of a default being committed by the treasurer, which default had not been and never was committed, the security should be in force. But what was the consequence? That the Lancaster Canal Company could not file a bill in equity, for the purpose of effectuating that security, until the default had been committed. It would have been a fraud in the Lancaster Canal Company to have set up, as against Dilworth, any rights under the agreement which had been entered into with them when there had been no default on the part of Dilworth, and the effect, therefore, was that there was no charge in equity upon the shares, by virtue of the transaction which * had taken place between Mr. Dil- * 736 worth and the Lancaster Canal Company, and certainly there was none at law. That, therefore, was a case in which the party claiming under the deposit had no right either at law or in equity. So in the case of *Nelson v. The London Assurance Company*. There the agreement between the parties contained this provision: "and further it was agreed that until there should be some order or resolution of the court of directors to the company, it should be lawful for each of those persons to receive their respective salaries, and the dividends upon their stock or shares, and to sell and transfer their stock or shares." Therefore, until the order and resolution of the company was made, there was no capacity on the part of those with whom the contract had been entered into, to enforce that contract in equity. Those two cases seem to me to be clearly distinguishable from the present; and I am satisfied that, in maintaining the decision of the learned commissioner, we should disturb transactions which have taken place,

and are constantly taking place with regard to property of this description, and that we should not be giving that effect to equitable rights which we are bound in bankruptcy, administering both law and equity, to give.

In the Matter of JAMES NORTON WEEKS, a Bankrupt.

1855. February 9, 27. Before the LORDS JUSTICES.

Where a bankrupt who had executed a trust deed for the benefit of his creditors had obtained an adjudication against himself, the validity of which was open to doubt, the Court suspended proceedings under it, at the instance of a creditor undertaking to apply for an adjudication on his own petition, although creditors' assignees had been appointed and opposed the application.

THIS was a motion by way of appeal from the decision of Mr. Commissioner FONBLANQUE, dismissing the petition of the appellant, whereby the appellant sought to have annulled an adjudication of bankruptcy, obtained by the bankrupt against himself.

The bankrupt had executed a trust deed for the benefit of his creditors, and there was a question whether the adjudication was legally or equitably valid under the following circumstances, as appearing from the petition of the appellant to the commissioner, and the affidavits in support of that application.

On the 7th of December, 1854, the appellant obtained a writ of *fi. fa.* against the bankrupt, who was a hotel-keeper at East Cowes, and, on the same day, the bankrupt executed the above-mentioned trust deed, which was made between himself of the first part, trustees of the second part, and the several other persons whose names should be thereunto subscribed or seals affixed of the third part. By this deed the bankrupt assigned "all and singular the stock in trade, household goods, chattels, furniture, debts and effects, bonds, bills, notes, and other securities whatsoever, and of what nature or kind soever," which were then due and belonging to him, to the trustees, in trust for his creditors.

On the 8th of December, the bankrupt filed a declaration
* 738 of insolvency, and on the same day presented a petition * for adjudication of bankruptcy against himself, supported by an

affidavit, and containing the required statement that he verily believed that his available estate was sufficient to produce 150%. The adjudication took place on the same day, and on the 19th of December, the trustees under the deed were chosen creditors' assignees.

The grounds on which the appellant sought by his petition to annul the adjudication were, that it had been obtained by concealment of the facts of the execution of the trust deed, and of the bankrupt having thereupon ceased to trade, and by an untrue representation as to the bankrupt's available assets, all his property having been divested by the deed. The petition was opposed by the assignees, on the grounds that the assignment was ineffectual, the bankrupt having continued in possession, and having carried on his trade until the bankruptcy, that at all events it did not comprise the bankrupt's interest in the lease of the hotel, and that the event had proved the truth of the bankrupt's allegation as to assets, there having been much more than 150% realized under the adjudication.

Mr. Bagshawe and *Mr. Bovill*, in support of the motion, referred to *Ex parte Philpott*, (a) *Stevenson v. Newnham*, (b) *Tope v. Hockin*, (c) and *Ex parte Louch*. (d)

Mr. Swanston and *Mr. Sewell*, for the assignees, repeated the arguments used below, and contended that there was no sufficient ground shown for disturbing the legal rights under the adjudication.

Mr. Faber, for the bankrupt.

THE LORD JUSTICE KNIGHT BRUCE. — I am of opinion that the validity of the present adjudication, * both legally and * 739 equitably, is open to some suspicion and doubt. I do not desire to say more, or to express an opinion that its invalidity, either legally or equitably, has been established. I believe that I can see very plainly that it must be for the benefit of the creditors of the bankrupt (on the assumption that any thing will remain to be distributed among them, after the payment of such costs as are

(a) De Gex, 346.

(b) 13 C. B. 285.

(c) 7 B. & C. 101.

(d) De Gex, 463.

fit to be paid out of the estate), and that it will not be to the unjust damage of the bankrupt, that another available adjudication should be substituted, if possible. I mean an adjudication at the instance of a creditor of some standing, whose debt will be sufficient to support it. If, then, the appellant will abandon the execution which he has obtained, for the benefit of the general creditors, as I understand him to be willing to do, the proper order will, I think, be to stay the proceedings under this bankruptcy till further order, the appellant undertaking to give up the benefit of his execution, and forthwith to apply for an adjudication against the bankrupt.

THE LORD JUSTICE TURNER. — I think it unnecessary to say whether the present adjudication is valid or not. On the facts appearing before us, I am satisfied that further proceedings under it may and probably will be attended with litigation and expense, and that the proper course will be that which my learned brother has mentioned.

The order was as follows : —

Wm. Taylor, by his counsel, hereby undertaking to give up the benefit of his execution, and all rights under it, to the general creditors of the bankrupt, and also to proceed forthwith, to obtain another adjudication of bankruptcy against the bankrupt, this

* 740 Court doth order that the said W. Taylor be at liberty to apply for such * adjudication accordingly, and that all proceedings under the present adjudication be stayed until further order, and the said parties, or either of them, are to be at liberty to apply to this Court touching the matters in question, as they may be advised.

February 27.

Subsequently the appellant obtained an adjudication, and the following order was made : —

This Court doth, with the consent of all parties, order that the adjudication of bankruptcy, bearing date the 8th of December, 1854, made against the said bankrupt, be, and the same is hereby annulled accordingly. And it is ordered, that the several proofs and proceedings, had and taken under such adjudication, be transferred to, and stand as proofs and proceedings under the adjudication, dated the 20th February, 1855, without prejudice to the

validity or invalidity of such proofs and proceedings, or any of them. And it is ordered, that the costs of the said assignees, and of the said bankrupt, of, and occasioned by the said first adjudication, and the proceedings thereunder, in her Majesty's Court of Bankruptcy, and also the costs of the said W. Taylor, and the said assignees of the interpleader proceedings, in the cause of *Taylor v. Weeks, Jolliffe and Another v. Taylor*, in Her Majesty's Court of Queen's Bench, together with the costs of all parties of and occasioned by the petition of the said W. Taylor to the Court of Bankruptcy, the said motion, former order, and by this application, be paid out of the estate of the said bankrupt. And it is hereby referred to the Master of the Court of Bankruptcy, to tax all the aforesaid costs. And it is hereby ordered, that the sum of 20*l.* deposited in pursuance of the 29th rule and order, made in pursuance of the Bankrupt Law Consolidation Act, 1849, be forthwith repaid to the said W. Taylor, or to Mr. Thomas Magnus Cattlin, his solicitor.

* *Ex parte* GEORGE TINDALL.

* 741

In the Matter of GEORGE TINDALL.

1855. July 28. Before the LORDS JUSTICES.

Personal service of a trader debtor summons under the 78th section of the Statute 12 & 13 Vict. c. 106, means showing the original summons and leaving a true copy.

A document in which the signature of the commissioner is not copied, is not a true copy of the summons.

An omission on the part of the trader to object to this defect at the time of the service: *Held*, no waiver of the objection within the 80th rule.

THIS was the petition of the bankrupt, to annul the adjudication for want of an Act of Bankruptcy, that relied upon being the failure of the petitioner, to attend on a trader debtor, summons issued against him, under the 12 & 13 Vict. c. 106, § 78.

The question was, whether the summons had been effectually served by delivering to the petitioner personally a copy of the original summons (in which, however, the signature of the com-

missioner was not copied), and showing to the petitioner the original, which was duly signed by the commissioner. At the time of the service being thus made, the petitioner made no objection.

Mr. Bacon and *Mr. Lucas*, in support of the petition. — The summons was never effectually served, as no complete copy of it was left with the petitioner, who could not ascertain, from the document left with him, whether the original was signed by the commissioner or not.

Mr. Swanston and *Mr. Raymond*, for the respondent. — The original summons was shown to the petitioner, who was bound by inspection to satisfy himself that it was signed by the commissioner. A copy of the commissioner's signature would have afforded him no additional information, nor does the Act require it to be copied, as it is not part of the summons. It would not show before
 * 742 * what commissioner the petitioner was required to appear, for the summons would be signed by the commissioner attending on that day, who might not be the commissioner in attendance when the summons came on. Even if there had been any want of form, it was waived by the petitioner within the meaning of the 80th rule, which provides thus: —

“ Any want of compliance on the part of the plaintiff with these rules and orders in the particulars of demand and notice, and in the affidavit for summoning the defendant, and in the summons and service thereof, or in any or either of such matters, may be waived by the defendant, or allowed to be rectified by the Court, when it shall not in the opinion of the Court be matter of substance, or shall have arisen from a mere slip; but unless waived by the defendant, or rectified with the consent of the Court, if the same shall be made known to and proved to the satisfaction of the Court, at the time required by the summons for the appearance of the defendant, it shall be deemed and taken to be a good objection to requiring the defendant to state whether or not he admits the demand sworn to by the plaintiff or any part thereof.”

They referred to *Hasker v. Jarmaine* (a) and Chitty's Common Law Practice.

(a) 1 Cro. & Mee. 408.

THE LORD JUSTICE KNIGHT BRUCE. — The Act requires personal service of the summons. I apprehend that the meaning of “personal service” in the section under consideration is, showing the original summons, and delivering to and leaving with the person served a *copy. This meaning has been settled, as I * 743 understand, by practice, and is not to be lightly departed from. Part of the ceremony, not an immaterial or unsubstantial part, was gone through. The original was shown to the gentleman, but, instead of a copy, a document was given to him, which, professing to agree with the original, differed from it in what I consider a material respect. The signature of the commissioner was omitted. Without this signature the original document, I believe, would be no summons, and consequently the document served was a copy of something which, as I believe, was not a summons. The question is, whether the petitioner has committed an act of bankruptcy, with all its important consequences. The omission to attend was not an act of bankruptcy, unless there had been personal service of the summons, and, as I must say that there has been no personal service, I am of opinion that there has been no act of bankruptcy.

THE LORD JUSTICE TURNER. — The term “personal service” is well understood, in Courts of Equity and other Courts, to mean the production of the original document and leaving a true copy of it; and, notwithstanding the doubts suggested by *Mr. Swanston*, I feel no doubt, that if this had been a case of commitment depending on the service of a document, the Court would, if the copy left was not a true copy of the document, discharge the order for commitment, or, at all events, refuse to act on the service. Here the case is still more difficult to maintain, for we are proceeding under a statutory jurisdiction which requires personal service. If we dispense with one objection to the service, we might dispense with any other. With respect to the question of waiver under the 80th rule, I think that the rule refers to something done before the commissioner, — not to a person refusing to attend.

* THE LORD JUSTICE KNIGHT BRUCE. — We do not mean * 744 to say how the case would have stood if this gentleman had appeared before the commissioner, or if the difference between the document left and the original had been only slight and unsubstantial.

Ex parte WILLIAM TODD, WILLIAM HEAP BUTTERWORTH, and JAMES STANSALL POTT.

In the Matter of GEORGE WILLIAMSON, a Bankrupt.

1855. July 30. Before the LORDS JUSTICES.

Where a defendant to an action for injury to the plaintiff's property caused by the explosion of the defendant's steam-engine, consented at the trial to an order of reference, and the award was not made till after the defendant's bankruptcy: *Held*, that the defendant had not before the bankruptcy contracted a liability to pay money upon a contingency within the meaning of the 178th section of the Bankrupt Law Consolidation Act.¹

THIS was an appeal of the assignees of a bankrupt from a decision of Mr. Commissioner JEMMETT admitting a proof for 597*l.* 7*s.* 5*d.*

In July, 1854, the bankrupt was the occupier of a building containing a steam-engine and boiler at Rochdale, and Mr. Reuben Bottomley was the occupier of a neighbouring mill and building.

On 15th of July, 1854, an explosion of the boiler took place and caused injury to the mill and premises occupied by Mr. Bottomley, who, on the 12th of February, 1855, commenced an action in the Court of Common Pleas against the bankrupt in respect of the damage.

The action was tried on the 2d of April, 1855, at the Liverpool Assizes; and an order was made on that day by * 745 * consent, that the jury should find a verdict for the plaintiff, damages 1000*l.*, costs 40*s.*, subject to be reduced according to the certificate of William Matthewson Hindmarch, so that he should make his certificate in writing concerning the premises in question on or before the 4th day of Easter term then next ensuing.

On the 5th of April, 1855 (after the order, but before the certificate of Mr. Hindmarch was given), the petition for adjudication was filed, and the adjudication took place on the 7th of the same month.

On the 18th of April, Mr. Hindmarch made his certificate in

¹ See *Ex parte* Bateman, 8 De G., M. & G. 265.

pursuance of the order, certifying that the plaintiff had, by reason and means of the causes of action in the declaration mentioned, sustained damages amounting in the whole to the sum of 338*l.* 4*s.* 5*d.*, and that the sum of 1000*l.* damages, for which it was so ordered that the jury should find such verdict as aforesaid, ought to be and should be reduced to 338*l.* 4*s.* 5*d.*, the amount of the damages by the plaintiff so sustained.

On the 20th of April, 1855, the plaintiff signed final judgment against the bankrupt without taxing the costs. On the 5th of June following, the costs were taxed at 239*l.* 3*s.* The damages and costs amounted to 597*l.* 7*s.* 5*d.*

At a sitting in the Bankruptcy Court, held on the 5th of June, 1855, the bankrupt obtained his certificate of conformity, which had since been cancelled, and, on the 28th of June, 1855, the commissioner admitted the proof under appeal.

Mr. Swanston and *Mr. B. L. Chapman*, in support of the appeal. — The commissioner admitted the proof on the ground * that the case fell within the meaning of the 178th * 746 section of the Bankrupt Law Consolidation Act. And it is clear that, independently of that enactment, there could be no proof. *Ex parte Butterfill*, (a) *Longford v. Ellis*, (b) *Ex parte Charles*, (c) *Buss v. Gilbert*, (d) *Re Gales*. (e) Is it, then, within the meaning of the section? Can the bankrupt be said to have contracted, before the filing of a petition for adjudication of bankruptcy, a liability to pay money upon a contingency which had not happened? We submit that he cannot. The liability could only have been under the submission to arbitration. But this was revoked by the bankruptcy. The assignees are not bound by the award which was made after the adjudication. Nor was the award a contingency within the meaning of the act. The contingency must be one arising out of the contract. It is impossible that by the accident itself the bankrupt can be considered as having contracted a liability, for the section speaks of "the person with whom such liability shall have been contracted," referring, therefore, clearly, to cases of contract, and not to a case of tort, a meaning rendered, if possible, clearer still by the words, "provided

(a) 1 Rose, 192.

(b) 1 H. Bl. 29*n.*

(c) 16 Ves. 256; 14 East, 197.

(d) 2 M. & S. 70.

(e) De Gex, 100.

such person had not, at the time when such liability was contracted, notice of an act of bankruptcy by such bankrupt committed."

They referred also to *Hinton v. Acraman*, (a) *Warburg v. Tucker*, (b) *Young v. Winter*, (c) and Richardson's Dictionary, "Contract."

Mr. Walker, for the respondent. — If there were a contract to pay for work done, such a sum as A. and B. should determine, and the bankruptcy occurred before the award, it could not be denied that the case would fall within the 178th section. I do not contend that the accident created a liability which could be the subject of proof; I rest the case entirely on the order by consent at Nisi Prius, which was made before the bankruptcy, and by which the assignees are bound. This being consented to was a contract to pay what should be awarded.

He referred to *Bonner v. Charlton*, (d) *Ex parte Harding*, (e) *Hankin v. Bennett*, (g) and *Ex parte Firbank*. (h)

Mr. Swanston, in reply, was stopped by the Court.

THE LORD JUSTICE KNIGHT BRUCE. — This case has been so fully and so well argued on each side, that we find ourselves able at present to dispose of it.

The order of Nisi Prius in this instance was made in an action which in spirit as well as letter, substantially as well as formally, was an action to recover damages for a tort merely, — as truly and as much so, in my opinion, as if it had been an action for an assault. The bankruptcy of the defendant, the adjudication of bankruptcy against him, took place before any award had been made under the order. It was made after the adjudication, but in the absence and without any participation upon the part of the assignees, who perhaps could not, perhaps could, have intervened or interfered; but not one of whom did in any manner intervene

(a) 2 C. B. 367.

(b) 5 Ell. & Bl. 384.

(c) 16 Com. B. 401.

(d) 5 East, 139.

(e) 5 De G., M. & G. 367.

(g) 8 Exch. 107.

(h) 15 Law T. 504.

or interfere, or attempt to do so. The question is, whether under the 178th * section of the Bankruptcy Consolidation * 748 Act, or otherwise, there can be a proof against the estate in administration in this bankruptcy by force, or in respect of the award or order. And considering that the bankruptcy did not, as to the bankrupt, effect a revocation of the order or submission; considering that if the action had not come on for trial, nor the order of *Nisi Prius* been made until at a time subsequent to the adjudication, there could have been no proof; and considering the particular language of the 178th section, I am of opinion that the proof in dispute was not properly capable of being made and cannot stand.

The case is distinguishable from that of *Thornthwaite*, (a) which was, in my opinion, rightly decided; nor am I sure that, if the action here had been an action for damages for a breach of contract, I should not have been equally for expunging the proof.

THE LORD JUSTICE TURNER. — *Mr. Walker* has put his case on the only ground on which he could put it, that of implied contract arising from the order of reference, to pay such sum as the arbitrator should award. There is no contingency in such a contract, except the contingency of the arbitrator not making an award. I cannot say that the act appears to me to have contemplated a contingency of that description. I am of opinion that the case is not within the 178th section, and that the proof must be expunged.

* *Ex parte* CHARLES WARWICK.

* 749

In the Matter of CHARLES WARWICK, a Bankrupt.

1855. August 1. Before the LORDS JUSTICES.

Attempted concealment by a bankrupt of property, although of small intrinsic value, and prized by him for the sake of family recollections and associations, held sufficient ground for refusing to disturb in his favor a suspension of his certificate for eighteen months without protection.

(a) 5 De G., M. & G. 367.

THIS was the appeal of the bankrupt from the decision of Mr. Commissioner SKIRROW, suspending the bankrupt's certificate for eighteen months without protection. The principal ground of the commissioner's decision was, that the bankrupt had kept his accounts improperly, with intent to conceal the true state of his affairs; but it appeared, also, that he had assigned all his household furniture to a friendly creditor, named Currie, by way of security, and that afterwards, finding himself in difficulties, he obtained from Mr. Currie some of the articles assigned, consisting of bronzes of small price, and other articles of trifling value, which he prized for family recollections and associations. These articles he sent to a friend in Hertfordshire with a letter requesting that they might be kept safe for him in case his affairs should go wrong.

Mr. Daniel and *Mr. Little*, in support of the appeal, being desired to address their observations in the first place to the facts stated as to the concealment of the goods, contended, that as the 5th division of the 256th section of the Bankrupt Law Consolidation Act only applied to concealment "with intent to diminish the sum to be divided" among the bankrupt's creditors, some substantial diminution must have been meant; and that the penalties intended to be inflicted by the Act could not have been meant to apply to a trifling matter of this kind.

On being asked by the Court, whether the bankrupt
* 750 desired to have substituted for the commissioner's decision * a total refusal of a certificate, they replied in the negative.

Mr. Bacon, for the assignees, was not called upon.

THE LORD JUSTICE KNIGHT BRUCE. — The commissioner, in arriving at his conclusion, has proceeded on various grounds, and seems to have laid less stress upon that part which related to the concealment of goods than I am disposed to do. More could not have been said than has been urged on behalf of the bankrupt, and, speaking with the reserve which is proper, when the argument on one side only has been heard, I may say that my present impression, as to the other points of the case, is rather favourable than otherwise to the bankrupt. The counsel for the assignees, if they had been heard, might very possibly have removed this impression.

I cannot, however, surmount the difficulty arising from the transaction avowed by the bankrupt to have taken place in the manner and circumstances described by himself. His property at Watford consisted mainly or entirely of household goods, on some of which he, excusably or even laudably, set a value independent of their intrinsic worth. He was desirous of preserving them. They were included in a security to a friendly creditor, Mr. Currie, as to which it may, I think, well be doubted, having regard to what the whole of the property was, whether the execution of that security did not constitute an act of bankruptcy as comprising substantially the whole of his property. There might have been some vague intention of returning to Mr. Currie the articles sent into Hertfordshire, or of accounting for their value at some future time; but the facts remain, that the articles were comprised in a security of doubtful, if any, * validity given to a friendly * 751 creditor, and that the bankrupt, intending to stop payment, and knowing that he must fail, carried them from his place of business, and sent them to be kept for him with the avowed motive of concealing them from his creditors. However little chance there could have been of effecting this, seeing that the articles were described in the schedule to Mr. Currie's deed,—however certain it may be that an attentive consideration of the circumstances of the case would have led a calm and reasonable man to the conclusion that no concealment could be effectual,—concealment was his wish, concealment was his object. A certificate has, however, been granted under certain conditions. With the view which I take of the duty of those who have to administer this branch of the law, I can offer the bankrupt no alteration of the decision of which he complains, except that of an absolute refusal of the certificate. His counsel prefer the order as it is, and the respondents do not ask for an alteration. It will, therefore, remain undisturbed, and the deposit must be applied towards payment of the respondents' costs.

THE LORD JUSTICE TURNER. — My opinion upon the points, other than that respecting the concealment of property (so far as an opinion can be formed without hearing the counsel for the respondents), is not unfavourable to the bankrupt. But this transaction of the delivery of the articles in question is one which I think it impossible to pass over. Probably the bankrupt was led into it by

error and inadvertence, but it was an act directly against the policy of the bankrupt law, and one which the Court would ill discharge its duty if it did not visit with the penalties which the law imposes. However, as no alteration in the commissioner's decision is asked by the assignees, the commissioner's order will stand.

In the Matter of JAMES HAYWOOD, against whom a Petition for Adjudication of Bankruptcy was filed on the 5th of July, 1855.

1855. August 1, 3. Before the LORDS JUSTICES.

A trader debtor, after having on a summons under the 78th section admitted the demand of a creditor, petitioned under the 211th section for an arrangement, and obtained *ex parte* an order for protection to his person and property from all process: *Held*, that the order did not protect him from a petition for adjudication of bankruptcy, or from adjudication thereon.

THIS was the appeal of the petitioning creditor from the order of the commissioner dismissing a petition for adjudication.

On the 2d of June the appellant had caused the respondent to be served with a trader debtor summons under the 78th section of the Bankrupt Law Consolidation Act. On the 9th of June the appellant appeared before the Birmingham District Court, and admitted the demand.

On the 16th of June the respondent filed a petition for arrangement with his creditors under the 211th section of the Bankrupt Law Consolidation Act, and praying that in the mean time his person and property might be protected from all process. An order in those terms was on the same day made on his *ex parte* application, the protection being granted till the 17th of July, or further order.

On the 5th of July, 1855, the appellant filed in the Birmingham District Court a petition for adjudication in bankruptcy against the respondent.

The petition for adjudication came on to be heard on the

12th of July, 1855, when the commissioner made the * order * 753
under appeal, the material part of which was as follows: —

“ The matter of this petition coming on this day before me to be heard, and upon hearing the said petition and affidavit thereto annexed, the affidavit of the petitioner Richard Walker, sworn the 6th of July instant, the affidavit of William John Newell the younger, sworn on the said 6th day of July, and the joint affidavit of the said Richard Walker and Edward Humphreys, sworn the 11th day of July instant, read, and upon hearing Mr. Collins, the solicitor for the said petitioner, who prayed that the said James Haywood might be duly adjudged a bankrupt, I refuse to proceed with such adjudication, and order that the petition of the said Richard Walker be dismissed, it appearing to me from the proceedings of this Court that the said James Haywood did on the 15th day of June last present his petition to this Court under the 211th section of the Bankrupt Law Consolidation Act, 1849, and that an order was made on the said 15th day of June that the person and property of the said James Haywood should be protected from all process until the 17th day of July, or until the further order of the Court.”

The prayer of the petition of appeal was, that the commissioner's order might be discharged, and that James Haywood might be adjudged a bankrupt, (a) or that the matter might be referred back to Mr. Commissioner BALGUY, with directions to proceed to an adjudication on the appellant's petition.

Mr. Giffard and *Mr. Lomer*, in support of the appeal. —

* A petition for adjudication is not “ process,” or, at all * 754
events, is not “ process ” within the meaning of the 211th section. Nor is the adjudication itself. The word “ process ” cannot be understood in its most extended meaning. It cannot, for example, be held to mean criminal process or ecclesiastical process. The object of the clause will be fully answered by construing process to mean final process in an action or suit.

They referred to Comyn's Digest, title “ Process,” 3 Blackstone's

(a) See *Ex parte Crabbe*, *post*, vol. vii.

Commentaries, 279; *Blackamore's Case*, (a) *The King v. Crisp*, (b) *Blackford v. Hill*. (c)

Mr. Bacon and *Mr. Woodroffe*, for the respondent. — The point was raised in *Ex parte Bowers*, (d) the decision in which case proceeded upon another ground. It has, however, been decided in the Bankruptcy Court, *Anonymous*, (e) that a petition for adjudication is process within the meaning of the Act; and that decision is correct; for if a trader's property is compulsorily taken from him, how can it be said to be protected from all process? The object of the arrangement clauses is to protect the bankrupt from compulsory proceedings on the part of his creditors until he has submitted to their consideration a proposal for arrangement. Moreover, after the petition for protection, the debtor cannot properly pay a debt, and his default cannot constitute an act of bankruptcy. If the construction contended for be upheld, any creditor

* 755 may prevent an arrangement from being carried into effect, although the requisite majority of creditors may approve * of it, which would be contrary to the intention of the arrangement clauses.

Mr. Giffard, in reply, being desired to confine his observations to the question of delay on the part of his clients, said that that point had not been raised, and that an explanation could be given if time were afforded for the purpose.

THE LORD JUSTICE KNIGHT BRUCE. — It may be as well to state now, how, in our opinion, the case would have stood if the appellant had proceeded at once (as on the 8th or 9th of June) to petition for adjudication, instead of waiting till the 16th. Treating the question as it would have stood on the hypothesis of the appellant having proceeded substantially without delay, I am of opinion that, according to the true construction of the Act of Parliament, where a trader debtor has appeared and filed an admission of a demand under the 79th and 81st sections, it is not competent to him, within the seven days mentioned in the 81st section, to take advantage of the provisions of the 211th section, against the

(a) 8 Co. 156 a.

(d) 1 De G., M. & G. 460.

(b) 1 B. & A. 282.

(e) Fonb. 48.

(c) 15 Q. B. 116.

creditor whose demand he has admitted under the 79th and 81st sections.

That being my opinion, if the petitioner in this case had proceeded with unquestionable despatch to obtain an adjudication of bankruptcy, I should have been disposed to decide in his favour, and against the validity of the proceedings taken by the respondent. My doubt arises from the apparent delay on the part of the appellant. But as his attention has not been called to this point, I think that he should be allowed an opportunity of giving an explanation.

* THE LORD JUSTICE TURNER. — I am of the same opinion. * 756
I think that under the 101st section it was the imperative duty of the commissioner to proceed to adjudication, the legal requisites having been proved before him, and that such a construction must be put upon the Act as to render it consistent if possible. With this view the word “process” should, I think, be construed as not applying to an adjudication of bankruptcy, even if it would be otherwise properly applicable to such a proceeding, which I doubt very much.

The case was ordered to stand over, to give the appellant an opportunity of explaining the delay.

August 3.

On this day, *Mr. Giffard* read an affidavit accounting for the delay.

Mr. Bacon and *Mr. Woodroffe* contended that it was not satisfactory.

Their Lordships considered the delay sufficiently accounted for, and made the following order: —

This Court doth order that the order of Mr. Commissioner BALGUY made in this matter, dated the 12th of July, 1855, be and the same is hereby discharged. And this Court doth declare that the said commissioner is to be at liberty to proceed to adjudicate, notwithstanding the petition of the said James Haywood under the arrangement clauses of the Bankrupt Law Consolidation Act, 1849; and in case the said petitioner shall obtain * an * 757

adjudication of bankruptcy against the said James Haywood, then it is ordered that the costs of the said petitioner of and occasioned by such adjudication, and the costs of all parties of and occasioned by this application, be paid out of the estate of the said James Haywood, such costs to be taxed by the registrar of the Court of Bankruptcy, for the Birmingham District, acting in the Court of the said commissioner; and it is ordered that the sum of 20*l.* deposited in pursuance of the 29th rule and order, made in pursuance of the Bankrupt Law Consolidation Act, 1849, be forthwith repaid to the said petitioner, or to Messrs. Bridger and Collins, his solicitors.

. *Ex parte* THOMAS BLAND.

In the Matter of JONATHAN MURGATROYD, a Bankrupt.

1855. November 9, 17. Before the LORDS JUSTICES.

Where a mortgagee submitted the question of the validity of his security to the jurisdiction of the commissioner, on an application of the petitioning creditor to set it aside: *Held*, that the commissioner, in deciding the question, was acting judicially, and not as an arbitrator, and that his decision was subject to appeal.

An assignment of the machinery and effects of a trader necessary for carrying on his trade, and comprising all his property except his household furniture and book-debts, which were of small value, he being at the time in insolvent circumstances: *Held*, to be fraudulent and void against the assignees on his becoming bankrupt.

THIS was the appeal of the petitioning creditor from the decision of Mr. Commissioner AYRTON, declaring an assignment made by the bankrupt valid.

The deed was an indenture, dated the 24th of May, 1855, and made between the bankrupt of the one part, and Jonathan William Anderton of the other part, whereby the bankrupt assigned to Jonathan William Anderton the machinery and effects used by the bankrupt in his business, and in the indenture more particularly * 758 described by way of mortgage, for securing a sum of 400*l.* then alleged to be due from the bankrupt to Jonathan William Anderton upon previous transactions between them in manner in the indenture mentioned.

The petition of appeal, and affidavit in support of it, stated that the machinery and effects comprised in the indenture were essential for the purpose of carrying on the business of the bankrupt, and formed the whole of his then property, except his household furniture and book debts, which were of small value; and that at the time of the execution of the indenture, the bankrupt was in insolvent circumstances, and was induced to execute the indenture without any professional or other adviser, and upon the assurance that the same was a mere form.

By arrangement the appellant, on the 28th of August, 1855, attended before Mr. Commissioner AYRTON, and by his counsel moved the Court of Bankruptcy, that the indenture of mortgage of the 24th of May, 1855, might be declared fraudulent and void, as against the creditors of the bankrupt, and that such part of the machinery and effects expressed to be thereby assigned as had not been sold, might be sold, and that the produce thereof, and of such part of the machinery and effects as had already been sold, might be applied for the benefit of the creditors of the bankrupt.

Mr. Anderton appeared on the hearing of the motion, and submitted to the jurisdiction of the Court of Bankruptcy.

The bankrupt having been examined, and the case argued before the commissioner, the order under appeal was made, declaring that the indenture of the 24th of May, 1855, was valid, and ought to be established, and * that the machinery and effects * 759 expressed to be thereby assigned, were the chattels and property of Jonathan William Anderton, and ordering that such part of the machinery and effects as had not been sold should be delivered up to Jonathan William Anderton, and that the produce of such part thereof as had been sold should be paid over to him.

Mr. Bacon, in support of the appeal, referred to *Wedge v. Newlyn*, (a) *Ex parte Bailey*, (b) *Smith v. Cannan*, (c) *Lindon v. Sharp*, (d) and *Ex parte Sparrow*. (e)

Mr. Giffard, for the respondent. — The appellant and respondent agreed to submit the question to the decision of the commissioner, and it being one over which he had no jurisdiction except

(a) 4 B. & Ad. 831.

(b) 3 De G., M. & G. 534.

(c) 2 Ell. & Bl. 85.

(d) 6 Man. & Gr. 895.

(e) 2 De G., M. & G. 907.

by consent, it is like an award, and not subject to appeal. . But if it be subject to appeal, it ought to be sustained ; for the cases cited on the other side are all distinguishable from it, there having been here a substantial exception of a part of the bankrupt's property. On the other hand, *Carr v. Burdiss* (a) strongly supports the decision.

Mr. Bacon, in reply.

Judgment reserved.

November 17.

THE LORD JUSTICE KNIGHT BRUCE. — In this case, the validity of the adjudication of bankruptcy is undisputed. The appellant * 760 is the petitioning * creditor. He has not proved for the purpose of a dividend ; but I have supposed, and still assume, that the debt, on which he obtained the adjudication, or a sufficient portion of it, was due to him on and before the 24th of May last, when the deed in question, called a bill of sale, was, as I understand the facts, executed by the bankrupt.

Upon the point raised by the appeal, this Court must be considered as having jurisdiction, which, if it would not otherwise have had, it acquired by the assent of the respondent Mr. Ander-ton. The learned commissioner, Mr. AYRTON, cannot be deemed to have acted or decided in the matter as an arbitrator, or otherwise than in the exercise of the proper functions judicially of a commissioner upon a litigation duly brought before him.

We have to determine, therefore, whether the deed of the 24th of May last, executed by the bankrupt, was an act of bankruptcy ; and it appears to me that the authorities oblige us to say that it was ; at least if I am right in supposing that the petitioning creditor's debt has existed from a time preceding the 24th of last May.

The bankrupt, upon the evidence, must be taken to have been in a state of insolvency, when he executed the deed, and to have continued so down to the speedily following adjudication of bankruptcy. This circumstance and the nature and provisions of the instrument, coupled with the essential importance to his business of the property assigned by it, and the very trifling amount of all

(a) 1 Cr., Mee. & R. 443.

that he had in the world besides, are, I conceive, decisive; at least, if we are bound by authorities, in my judgment, as I have said, binding on us, — authorities which, or as many of which as could be necessary, were cited at the bar during the argument. Our order must, I * think, therefore, be accordingly; * 761 at least, if, as I have said, the petitioning creditor's debt was due when and before the deed was executed.

THE LORD JUSTICE TURNER. — This case appears to me to combine within itself all the materials which in the reported cases have been held to constitute the execution of such an instrument as the one before us an act of bankruptcy. There is an assignment of nearly all the property of the bankrupt, — of the machinery by which alone his trade could be carried on, — for securing a pre-existing debt, coupled with utter insolvency. I am clearly of opinion, both upon principle and authority, and particularly upon the authority of the case of *Lindon v. Sharp*, (a) that the decision of the commissioner in this case cannot be supported.

* *Ex parte* WILLIAM HODGSON BOWES BARWIS, * 762
EDMUND WALLER, CHARLES APPLEYARD, and
WILLIAM BELL.

In the Matter of WILLIAM STRAHAN, SIR JOHN DEAN
PAUL, and ROBERT MAKIN BATES, Bankrupts.

1855. November 23, 24. Before the LORDS JUSTICES.

A covenant by sureties that the principal debtor would pay a debt by three yearly instalments: *Held*, on the principal debtor becoming bankrupt after payment of the first and before the time for payment of the second instalment, to be a contingent liability properly the subject of a claim under the 168th section.¹

(a) 6 Man. & G. 895.

¹ See *Kent v. Thomas*, L. R. 6 Exch. 312. As to proof, under the United States Bankrupt Act, in case of contingent liabilities, see *Boyd v. Robins*, 4 C. B., N. S. 749, and note and cases cited at the end; *Loring v. Kendall*, 1 Gray, 305; *Leighton v. Atkins*, 35 Maine, 118; *Swain v. Barber*, 29 Vt. 292; *Hol-*

THIS was the appeal of the assignees from the decision of Mr. Commissioner FANE, admitting a claim on behalf of the respondents for a contingent liability.

By an indenture dated the 2d of June, 1854, and made between Julius Cicero Fay of the first part, Walter Richard Critchley of the second part, and William Strahan, Sir John Dean Paul, and Robert Makin Bates of the third part, John Haskins Gandell and Edward Frederick Gandell of the fourth part, and Henry Dunlop, Alexander Wingate, Andrew Stephenson Dalglish, William Whyte, and John Tennant of the fifth part, in consideration of 20,000*l.* paid immediately before the execution of the deed by the persons who were parties to it of the fifth part to John Haskins Gandell and Edward Frederick Gandell, they, and the bankrupts as sureties for them, for themselves jointly and severally, and for their respective heirs, executors, and administrators, covenanted with Henry Dunlop, Alexander Wingate, Andrew Stephenson Dalglish, William Whyte, and John Tennant, their executors, administrators, and assigns, that John Haskins Gandell and Edward Frederick Gandell, their executors or administrators, would pay unto Henry Dunlop, Alexander Wingate, Andrew Stephenson Dalglish, * 763 William Whyte, and John Tennant, * their executors, administrators, or assigns, the principal sum of 20,000*l.* by the following instalments, that is to say, 6650*l.* on the 2d of June, 1855, 6650*l.* on the 2d of June, 1856, and 6700*l.* on the 2d of June, 1857, with interest at the following rates ; that was to say, up to the 2d of June, 1855, at the rate of 6*l.* per cent per annum, and afterwards at the rate of 5*l.* per cent per annum, or at such rate as therein mentioned.

The first instalment of interest became due on the 2d of December, 1854, and was paid on the 6th of December, 1854. The first instalment of the principal became due and was paid with interest on the 2d of June, 1855.

The petition for adjudication was filed on the 11th of June, 1855.

John Haskins Gandell and Edward Frederick Gandell had been declared bankrupts according to the laws of France, where they were resident, and were unable to pay the balance of the principal and other moneys secured by the deed, and there remained due in

brook *v.* Foss, 27 Maine, 441 ; Pike *v.* McDonald, 32 Maine, 418 ; French *v.* Morse, 2 Gray, 111 ; Ellis *v.* Ham, 28 Maine, 387 ; Read *v.* Pierce, 36 Maine, 455.

respect of those moneys 13,350*l.*, for which the respondents tendered a proof under the 178th section of the Bankrupt Law Consolidation Act, 1849. The claim, which was the subject of the appeal, was opposed before the commissioner on behalf of the appellants, who submitted that the liability of the bankrupts upon the indenture was not a liability to pay money upon a contingency within the meaning of the section, and that the same was not provable or claimable under the petition for adjudication.

The commissioner, having taken time to consider the * case, gave the following written judgment upon it and * 764 upon another of a similar description: —

“I have very much considered these cases, and I have carefully perused the numerous authorities cited; but as the cases appear to me merely cases of guarantees, I do not feel it necessary to remark on the cases cited. I consider the case of *Re Willis (a)* as decisive on the matter. This case, as it appears to me, is not questioned in the cases cited; consequently the parties must be admitted to prove for the amount now due, and to enter claims as to the contingent debts.”

Mr. Chandless and *Mr. Hannen*, in support of the appeal. The commissioner has decided this case irrespectively of the provisions of the 178th section, (*b*) and must have considered it as

(*a*) 4 Exch. 580.

(*b*) Sect. 178. “That if any trader who shall become bankrupt after the commencement of this Act shall have contracted, before filing a petition for adjudication of bankruptcy, a liability to pay money upon a contingency which shall not have happened, and the demand in respect thereof shall not have been ascertained before the filing of such petition, in every such case, if such liability be not provable under any other provision of this Act, the person with whom such liability has been contracted shall be admitted to claim for such sum as the Court shall think fit; and after the contingency shall have happened, and the demand in respect of such liability shall have been ascertained, he shall be admitted to prove such demand, and receive dividends with the other creditors, and, so far as practicable, as if the contingency had happened and the demand had been ascertained before the filing of such petition, but not disturbing former dividends, provided such person had not, at the time such liability was contracted, notice of any act of bankruptcy by such bankrupt committed; provided also, that where any such claim shall not have, either in whole or in part, been converted into a proof within six months after the filing of such petition, it may, upon the application of the assignees at any time after the expiration of such

* 765 falling within those of the *177th, (a) as he relies upon the authority of *Re Willis*, (b) which turned on the 6 Geo. 4, c. 16, § 56, re-enacted by the 177th section of the present Act. The correctness of the decision in that case, however, may be questioned, for it proceeded upon the authority of *Ex parte Myers*, (c) as originally heard, and without adverting to what appears on the rehearing of that case, under the name of *Ex parte Simpson*, (d) viz., that Myers & Co. had paid their first acceptances before the bankruptcy of Henry Sudell, to a larger amount than that which was claimed, — a fact on which, on the rehearing, the Court rested its judgment, and which distinguished the case from *Re Willis*. This omission possibly misled the Court of Exchequer in deciding *Re Willis*, as to the facts and true ground of the decision in *Ex parte Myers*. But *Re Willis* is distinguishable from the present case, for the contract in *Re Willis* was not one of suretyship, but was an original and primary undertaking, in the nature of

* 766 a *contract of insurance at a premium. A covenant to indemnify was held by the same learned Judge, who decided *Re Willis*, after the decision in the Court of Exchequer, not to constitute a provable debt, *Ex parte Meyer*, (e) on the ground

time, and if the Court shall think fit, be expunged either in whole or in part from the proceedings."

(a) Sect. 177. "That if any bankrupt shall, before the issuing of the *fiat* or the filing of a petition for adjudication of bankruptcy, have contracted any debt payable upon a contingency which shall not have happened before the issuing of such *fiat* or the filing of such petition, the person with whom such debt has been contracted may, if he think fit, apply to the Court to set a value upon such debt, and the Court is hereby required to ascertain the value thereof, and to admit such person to prove the amount so ascertained, and to receive dividends thereon; or if such value shall not be so ascertained before the contingency shall have happened, then such person may, after such contingency shall have happened, prove in respect of such debt, and receive dividends with the other creditors, not disturbing any former dividends, provided such person had not, when such debt was contracted, notice of any act of bankruptcy by such bankrupt committed."

(b) 4 Exch. 530. A note of this case before the Lord Justice KNIGHT BRUCE, when Vice-Chancellor, is subjoined, as taken by the reporter at the time; see *post*, p. 771.

(c) Mont. & B. 229; 2 D. & C. 251.

(d) 1 Mont. & A. 556, 561; 3 D. & C. 792; and see *per* ERSKINE, J., in *Abbott v. Hicks*, 5 Bing. N. C. 590.

(e) 12 Jur. 447; see *post*, p. 775, for a note of the case taken by the reporter at the time.

that the point was settled, as it had indeed been long previously by authority. *Ex parte Marshall*, (a) *Thompson v. Thompson*, (b) *Ex parte Thompson*, (c) *Lane v. Burghart*, (d) *Abbott v. Hicks*, (e) *Amott v. Holden*. (g) The commissioner was therefore, we submit, in error in holding the case to fall within the 177th section. But it will be contended that the claim is admissible under the words of the 178th section. Now there are only three authorities at present on the construction of this section, and two of them are in some degree in conflict. The first is *Young v. Winter*, (h) where a debtor assigned to his creditor a policy of assurance on the debtor's life, and covenanted to pay the annual premiums, and in case he did not, and the creditor should pay them, the debtor would repay the creditor the amount, with interest, on demand. The debtor afterwards became bankrupt, and obtained his certificate. A premium accrued due after the bankruptcy, which the bankrupt failed to pay, and which was paid by the creditor. The Court of Common Pleas held that the bankrupt was not discharged by his certificate from liability in respect of the covenant to pay the premiums, but held that he was discharged as regarded the failure to repay the premium paid by the creditor. No reasons, however, are given in the judgment. Subsequently a case of *Warburg v. Tucker* (i) came before the Court of Queen's Bench, the circumstances of which were nearly the same. There was in * that case also an assignment by the defendants of poli- * 767
cies of insurance to the plaintiff, his creditor, as a security, and the defendants covenanted punctually to pay the annual premiums, and that, if he should neglect to make such payments, it should be lawful for the plaintiff to pay the premiums which might become payable for keeping on foot the said policies respectively, or for effecting or keeping on foot any other policy or policies in lieu thereof, and that the defendant would, on demand, pay to the plaintiff all moneys so paid with interest. The defendant pleaded his certificate under a *fiat* in bankruptcy, sued out against him subsequent to the execution of the deed, but did not allege that it was subsequent to the breaches. Lord CAMPBELL said: "It appears to us quite clear that the certificate can be no bar as to

(a) 3 D. & C. 120.

(e) 5 Bing. N. C. 578.

(b) 2 Bing. N. C. 168.

(g) 18 Q. B. 593.

(c) 2 D. & C. 126.

(h) 16 Com. B. 401.

(d) 3 Man. & Gr. 597.

(i) 5 Ell. & Bl. 384.

the first breach. The covenant to pay the premiums of insurance on the three policies did not constitute 'a liability to pay money upon a contingency.' The covenant is absolute, and the machinery provided for admitting a claim and proof under this section is wholly inapplicable to such a demand. Although there may be more doubt as to the second breach, we think that on this, likewise, the plaintiff is entitled to our judgment." "We do not think that provision is made by the section for a case like this, where there are to be successive payments on successive contingencies, during the whole of the lives of two individuals and the life of the survivor. The plaintiff, in seeking a remedy under the *fiat*, must first have made a claim for such a sum as the Court should think fit. It is difficult to say on what principle the Court could proceed in fixing this sum. But, supposing a sum to be fixed, insuperable difficulties present themselves before the plaintiff could be entitled to receive dividends with the other creditors. The successive contingencies here, on which the defendant

becomes liable in consequence of the breach of the covenant,
 * 768 are, * the non-payment by the defendant of the annual payment of the premium from year to year on each of the three policies, the plaintiffs paying these premiums, or reinsuring after the policies were forfeited, and the plaintiff making a demand upon the defendant for the amount of the money so advanced. But the section seems to contemplate only the happening of one contingency, whereupon the whole demand in respect of the liability shall be ascertained, and thereupon 'he shall be admitted to prove such demand, and receive dividends with the other creditors.' . . . For the happening of subsequent contingencies, on which a fresh liability under the covenant would attach, no provision appears to be made, so that there could be no further proof, and for subsequent breaches no dividend could be obtained. The words 'so far as practicable' occur, but they are only applicable to the receipt of dividends by reason of one contingency having happened. . . . In any attempt to admit the covenantee, in such a case, to have a value put upon the whole covenant, and to receive dividends with the other creditors, the difficulties appear equally insuperable as those which induced the Court of Common Pleas to hold in *Thompson v. Thompson*, (a) and this Court in *Amott v.*

(a) 2 Bing. N. C. 168.

Holden, (a) that the surety for the payment of an annuity was not discharged by his certificate. It appears to us, therefore, that to effect the complete discharge of a bankrupt from all liability in respect of such a deed as this, the further interposition of the legislature is still necessary, and that in this case we are bound on both breaches to give judgment for the plaintiff.”

We submit that the similarity of the present case to that of a proof against a surety for the future payment of an annuity is complete, and it seems clear from the 175th * and 176th * 769 sections of the Act, that such a liability is not contemplated as falling within the 178th. The remaining case is *Ex parte Todd*, (b) where this Court held that a consent to a verdict for such an amount as should be determined by an award did not after the award made become provable under the section.

Mr. Swanston and *Mr. Giffard*, for the respondent. — They contended that, whether this case were within the 177th section or not, it was within the 178th.

They referred to *Ex parte Minet*. (c)

Mr. Chandless, in reply. •

THE LORD JUSTICE KNIGHT BRUCE. — This Act of Parliament is assuredly not without faults, but I think it not so badly framed as the appellant would have us consider it. In my opinion, it would be an inconvenient and erroneous construction of the Act, to hold that it does not authorize a claim of this description to be placed upon the proceedings.

THE LORD JUSTICE TURNER. — Up to the time of the passing of the Bankrupt Law Consolidation Act, the law had made no provision for working out under a bankruptcy claims founded upon contingent liabilities. The 178th section of that Act is intended to supply that defect, and it shows the intention of the legislature to exonerate a bankrupt as far as possible from all liability incurred before his bankruptcy. It is the duty of the Court to endeavour to carry into effect the intention of the legislature.

* Now the covenant upon which the present claim is * 770

(a) 18 Q. B. 593.

(b) *Ante*, p. 744.

(c) 14 Ves. 189.

founded, is one by the bankrupts and others, that the others shall pay a sum by instalments with interest. This created, as it appears to me, a liability depending upon a contingency; namely, the contingency of the principal debtors not paying the sums covenanted to be paid. It is said that this is not a contingent liability to pay any particular sum of money. But it is in substance a covenant to pay such of the specified sums as shall not be paid by the principal debtors. It is said that the amount to be paid must be uncertain, inasmuch as the person immediately liable might make some of the payments, leaving it in uncertainty what the deficiency would be, and there is some truth in that observation, but here there is a measure and a limit of the liability. It cannot exceed a certain sum. The Act appears to me to have been intended to meet such a case, for it gives a discretion to the commissioner as to the amount for which the claim shall be entered.

With regard to the cases cited upon the construction of the 178th section, that which was before us, *Ex parte Todd*, was one of unliquidated damages, which were to be determined by an arbitrator, and, therefore, not a case resembling the present; and, looking at the other two, I do not think it necessary to give any opinion upon them, since this case differs from them in the circumstances of the liability here being one which must be determined within three years, and, therefore, fairly, as it appears to me, within the meaning of the Act of Parliament; but if I were called upon to give an opinion on those cases, I must say that they do not seem to me reconcilable with each other, and that I should prefer the decision in *Young v. Winter*.

* *Ex parte* JOSEPH BROOK, RICHARD BROOK, * 771
 GEORGE HENRY BROOK, and THOMAS BROOK
 GOLDEN. (a)

In the Matter of WILLIAM WILLIS.

1848. March 6. July 26. 1850. January 16. Before the Vice-Chancellor
 KNIGHT BRUCE.

A bankrupt had, in consideration of the payment of a sum of money to him by the vendors of goods, guaranteed the payment of the purchase-money by the purchasers, according to the contract of purchase, viz., by the due honour of a bill of exchange accepted by the purchasers. The bill did not fall due till after the *fiat* issued against the guarantor. On its being dishonoured, *held*, that the vendors were entitled to prove.

THIS was a petition by way of appeal from the rejection of a proof.

The petitioners, who were wool-brokers at Huddersfield, received on the 18th of March, 1847, an order from certain customers, named Wilkins & Evans, for 136 bales of wool. The petitioners agreed to execute the order on receiving from the bankrupt the following guarantee : —

“ Messrs. J. Brook, Sons, & Co.

“ Gentlemen, — In consideration of 1l. per cent, I hereby guarantee the due and correct payment of one-half the amount of 136 bales of wool sold to Messrs. Wilkins & Evans of Trowbridge, as per contract of Mr. Richard Dutton, dated the 18th inst.

“ I remain, gentlemen,

“ Your most obedient,

“ W. WILLIS.

“ TROWBRIDGE, March 19th, 1847.”

The contract referred to was the following : —

“ LONDON, 18th March, 1849.

“ Sold for account of Messrs. Joseph Brook, Sons, & Co. to Messrs. Wilkins & Evans the following wools, viz. : —

(a) Referred to *ante*, p. 765.

No. 1/89, 89 bales, at 2s. 4½d.

95/141, 49 bales, at 2s. 4d.

* 772 * “ Customary tare and draft to be weighed off, and the amount paid by buyers, acceptance at eight months, dated from 18th May next. Brokerage 1l. per cent.

“ RICHARD DUTTON.”

The 136 bales were thereupon, in due course of business, weighed and delivered in accordance with the contract; and for the net price thereof, amounting to the sum of 2966l. 5s. 4d. the petitioners, in accordance with the contract, drew their bill of exchange of the 18th of May, 1847, on Messrs. Wilkins & Evans, payable eight months after date to the petitioners' order. The bill was duly accepted by Messrs. Wilkins & Evans, and became due on the 21st of January, 1848.

The petitioners paid to the bankrupt on the 4th of September or allowed to him 14l. 17s. in satisfaction of the commission of 1l. per cent for his guarantee.

Messrs. Wilkins & Evans subsequently became bankrupts, and a *fiat* issued against them dated the 20th of October, 1847.

The bill for 2965l. 5s. 4d. was dishonoured on the 21st of January, 1848, and was now in the hands of the petitioners unpaid.

The petitioners tendered a proof against the present bankrupt for 1482l. 2s. 8d. under the guarantee, but the commissioner rejected the proof on the ground that the liability incurred by the guarantee was not a contingent debt within the meaning of the 6 Geo. 4, c. 16, § 56.

Mr. Russell and *Mr. Glasse*, in support of the petition, cited *Ex parte Myers*. (a)

* 773 * *Mr. Bacon*, for the assignees.

The Vice-Chancellor directed the admission of the proof.

After the decision in another case, *Ex parte Meyer*, (b) some of the creditors of the bankrupt Willis obtained leave to have the case of *Ex parte Brook* reheard.

(a) Mont. & B. 229; 2 D. & C. 251.

(b) See next case.

July 26.

The case accordingly came on this day, and was reargued by *Mr. Swanston, Mr. Russell, Mr. Bacon, Mr. Glasse, and Mr. Bagshawe.*

They referred to and commented upon *Ex parte Lancaster Canal Company*, (a) *Filby v. Lawford*, (b) *Lane v. Burghart*, (c) *Yallop v. Ebers*, (d) *Ex parte Grundy*, (e) *Ex parte Lewis*, (g) *Ex parte Tindall*. (h)

THE VICE-CHANCELLOR. — When this case was before me upon the first occasion, the arguments, although submitted with perfect fairness, were not conducted adversely. That, however, is a matter of no moment. I certainly thought at the time that the proof might be admitted upon the authorities then cited. Afterwards the case *Ex parte Meyer* came on, in which the authorities were more fully discussed, and more minutely canvassed; and I then stated that I should be willing to rehear *Ex parte Brook* if any of the parties in that case desired it. I have considered * the point very much since the decision in *Ex parte Meyer*, * 774 and I confess that my opinion remains unshaken. I think, with great deference to those who entertain a different opinion, that the Act might have been well interpreted so as to admit a proof of this description. The question may be, whether the preponderance of authority is not, upon the whole, against the proof. I think that I ought not to refuse to give an opportunity of trying this question at law.

A case was then settled for the opinion of the Court of Exchequer, which decided in favour of the proof: see *In re Willis*. (i)

1850. January 16.

The case now came on to be disposed of.

Mr. Swanston and Mr. Sewell, in support of the petition.

(a) Mont. 27.

(b) 4 Scott, N. R. 208.

(c) 3 Man. & Gr. 597.

(d) 1 B. & Ad. 698.

(e) Mont. & Mac. 293.

(g) *Ibid.* 426.

(h) *Ibid.* 415.

(i) 4 Exch. 530.

Mr. Russell and *Mr. Glasse*, for the assignees, contended that the decision of the Court of Exchequer was not satisfactory, as recent cases before the Court of Queen's Bench and the Court of Common Pleas had not been referred to in the judgment of the Court of Exchequer, which had wholly proceeded upon the former decisions of this Court.

THE VICE-CHANCELLOR. — I think that abstract justice and reason are in favour of the proof, and the Court of Exchequer has now decided that the law is also in its favour. (a)

* 775 * *Ex parte* FREDERICK MEYER. (b)

In the Matter of EDWARD SIMEON MEYER and THOMAS GEORGE BROWNSMITH.

1848. May 31. Before the Vice-Chancellor KNIGHT BRUCE.

A., and B. his surety, entered into a bond for payment, by instalments, of a debt of A., and also of interest and premiums on a policy. As part of the same arrangement, A. and C. (his partner) entered into a counter security to B. by way of joint covenant of indemnity. A. and C. became bankrupt, and the condition of the bond, having been fulfilled up to the date of the *fiat*, was afterwards broken: *Held*, that B., who paid the amount, could not prove against the joint estate of A. and C. on the counter security.

THIS was an appeal from the decision of a Subdivision Court, rejecting a proof tendered by the petition upon a deed of counter security.

In April, 1847, the bankrupts Edward Simeon Meyer and Thomas George Brownsmith agreed to become partners as fringe and lace makers, and part of the terms upon which the partnership was formed was, that the bankrupt Edward Simeon Meyer should advance 1750*l.* by way of capital. He had only 1000*l.*, and borrowed the remaining 750*l.* from the Victoria Life Assurance and Loan Company, upon the security of a policy for 1500*l.* effected by

(a) See *Ex parte* Meyer, next case, and see *Ex parte* Evans, 3 De G. & Sm. 563.

(b) See *ante*, 766.

him with them on his own life, with a bond given to the company in the same amount, under the hands and seals of himself and two sureties, one of whom was the petitioner. By this bond, which was dated the 10th of June, 1847, the bankrupt Edward Simeon Meyer and the two sureties, for themselves and each of them, any two of them became jointly and severally bound to three of the trustees of the Insurance Company in the sum of 1500*l.*, subject to a condition whereby, after reciting that the sureties had agreed to join with Edward Simeon Meyer in the bond, subject to the conditions thereunder written, as sureties for Edward Simeon Meyer, the bond was to be void on the bankrupt E. S. Meyer and the two sureties, or any or either of them, paying to the trustees 750*l.*, by three equal annual instalments of 250*l.* each on the 16th day of June in each of the *years 1848, 1849, and *776 1850, or on the day of the decease of Edward Simeon Meyer, which should first happen, and also in the mean time, and until the principal sum of 750*l.* should become due as aforesaid, and until the same should be fully paid unto Benjamin Hawes, Benjamin Barnard, and Charles Baldwin, interest after the rate of 5*l.* per cent per annum for the principal sum of 750*l.*, or so much thereof as should from time to time remain due and unpaid, by half-yearly payments, on the 16th day of June and 16th day of December in each year, and on their in the mean time paying the annual premiums on a policy ; and it was provided that, if default should be made in payment of the interest, or of any of the instalments or of the premiums, according to the stipulations aforesaid, then the whole of the principal should thereupon become payable.

The counter security was effected by a deed, dated the 29th of June, 1847, and made between the two bankrupts of the first part, Joseph Trueman, the petitioner's co-surety, of the second part, and the petitioner of the third part. It recited the articles of copartnership, the policy, and the bond ; and it witnessed that the two bankrupts, as such copartners as aforesaid, and so as to bind themselves jointly and their copartnership estate, did thereby for themselves, their heirs, executors, and administrators, jointly, and each of them did thereby for himself, his heirs, executors, and administrators severally, and also as to bind the one for the other of them and his own separate estate, covenant and agree with Joseph Trueman and the petitioner, and to and with each of them and each of their executors and administrators, that they, Edward

Simeon Meyer and Thomas George Brownsmith, their or one of their heirs, executors, and administrators, should and would duly and punctually pay or cause to be paid the half-yearly or
* 777 other interests * which should from time to time be payable to the obligees of the recited bond, their executors or administrators; and also should duly and punctually pay to the obligees, their executors or administrators, the annual premium or sum of 56*l.* 8*s.* 9*d.* payable in respect of the policy; and also should duly and punctually pay to the obligees, their executors or administrators, the sum of 150*l.*, being the unpaid balance of the first instalment; and should also duly and punctually pay the two remaining instalments of 250*l.* on the respective days on which the same were by the bond respectively appointed to be paid, and should on the 16th day of June, 1849, repay the sureties, their executors or administrators, the sum of 100*l.*, which had been actually advanced by them towards payment of the first instalment, with interest at 5*l.* per cent per annum from the time of the advance; and further that in case the bankrupts should fail or neglect to make these payments to the obligees, the bankrupts, or one of them, their or one of their executors or administrators, would pay and reimburse to the sureties all such sums of money, costs, charges, damages, and expenses, as they respectively, or their respective heirs, executors, or administrators, should or might at any time or times thereafter pay, sustain, or incur by reason of the non-payment by the bankrupts, or one of them, of all and every or any the sum or sums of money secured or made payable by the bond, or by reason or in consequence of the non-performance or non-observance of the acts, matters, and things stipulated by or contained in the condition thereof, with interest at 5*l.* per cent per annum.

The condition of the bond given to the Insurance Company was performed up to the time of the issuing of the *fiat*. On default being afterwards made, the petitioner paid the 750*l.* to the company, according to the condition of the bond. He then,
* 778 before any dividend * had been declared, or either bankrupt had obtained his certificate, tendered a proof for this amount. The question of its admission was adjourned, and was argued before a Subdivision Court, consisting of Mr. Commissioner EVANS, Mr. Commissioner FANE, and Mr. Commissioner SHEPHERD, who differed in opinion; but the majority, consisting of Mr.

EVANS and Mr. SHEPHERD, decided against the admission of the proof.

Mr. Bacon and *Mr. Tripp*, for the petitioner. — The contract entered into by the bankrupts was to repay whatever amount the petitioner should be obliged to pay in respect of the bond. The amount secured was 750*l.* and the expenses. Therefore the bankrupt, before the issuing of the *fiat*, had contracted a debt to the petitioner to this amount, payable upon a contingency (*viz.*, the contingency of the bankrupts themselves not paying the debt secured by the bond), and the contingency had not happened before the issuing of the *fiat*. Surely it would be to render this provision inoperative, to refuse to apply it to such a case as the present; and if there be a conflict of authority, the Court will incline to follow those authorities which so construe the Act as to render it most beneficial to creditors, according to the rule of construction which the Act itself prescribes. But the authorities are upon the whole in favour of the proof. *Ex parte Myers*, (a) *Ex parte Simpson*, (b) *Ex parte Lewis*, (c) *Ex parte Brook*. (d)

Mr. Russell and *Mr. Aspland*, for the respondents. —
 * The true construction of sect. 56 of the Act is against the * 779
 petitioner. How can it be said that the bankrupt Brownsmith had contracted any debt before the issuing of the *fiat*, nothing being due at all from any one at that time? Moreover, it should be considered that where there is a debt payable on a contingency, the contingency must be capable of valuation to form the ground of a proof. The bankrupt Brownsmith was himself only a surety for his partner. Therefore the agreement is (as to Brownsmith) a covenant by one surety to indemnify another surety. If the 56th section included such contingent liabilities as these, section 53, giving a right of proof in respect of bottomry and respondentia bonds, would have been unnecessary. The claim here is for unliquidated damages, which cannot be the subject of a proof. *Green v. Bicknell*. (e)

They referred to and commented upon *Re Gales*, (g) *Yallop v.*

(a) Mont. & B. 229; 2 D. & C. 251.

(b) 1 Mont. & A. 451; 3 D. & C. 792.

(c) Mont. & Mac. 426.

(d) *Ante*, p. 771.

(e) 8 A. & E. 701.

(g) De Gex, 100.

Ebers, (a) *Abbott v. Hicks*, (b) *Hinton v. Acraman*, (c) *Thompson v. Thompson*, (d) *Lane v. Burghart*, (e) *Atwood v. Partridge*, (g) *Toppin v. Field*, (h) *Clements v. Langley*, (i) *Wallis v. Swinburne*, (k) *Ex parte Porter*, (l) and contended that *Ex parte Myers* had been either overruled or explained, so as to be no authority on the present occasion. *Ex parte Marshall*, (m) *Ex parte Simpson*, (n) *Abbott v. Hicks*, (b) *Hinton v. Acraman*. (c)

* 780 * *Mr. Bacon*, in reply.

THE VICE-CHANCELLOR. — The application to prove being confined to the 750*l.*, it is very possible that had I to decide this case by my own unassisted judgment, independently of authority, I should hold that, according to the true construction of the Act of Parliament, the proof ought to be admitted. But a series of authorities of great weight appear to me substantially irreconcilable with such a decision. I cannot, therefore, take upon myself to admit the proof, but must adhere to the view taken by the majority of the commissioners. I do so, acting upon authority, and authority only.

See *Ex parte Evans*, 3 De G. & S. 561.

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| (a) 1 B. & Ad. 698. | (g) 4 Bing. 209. |
| (b) 5 Bing. N. C. 578. | (h) 4 Q. B. 386. |
| (c) 2 Com. B. 367. | (i) 5 B. & Ad. 372. |
| (d) 2 Bing. N. C. 168. | (k) 1 Exch. 203. |
| (e) 3 Man. & Gr. 597; 1 Q. B. 933. | |
| (l) 4 D. & C. 774; 2 Mont. & A. 281. | |
| (m) 1 Mont. & A. 145; 3 D. & C. 120. | |
| (n) 1 Mont. & A. 541; 3 D. & C. 792. | |

* *Ex parte* JOHN DOBSON and JAMES CONLEY. * 781

In the Matter of JOHN STRONG, a Bankrupt.

1855. December 7. Before the LORDS JUSTICES.

Where a bankrupt has been negligent, careless, rash, improvident, or lavish, there may be differences of opinion as to granting him a certificate as to its class, or as to the conditions (if any) which should be annexed to it. But in a case where there had been wilful falsehood and dishonesty, their Lordships, reversing the decision of a commissioner, refused to allow the certificate.

THIS was the appeal of the assignees against the allowance by Mr. Commissioner PERRY of the bankrupt's certificate.

The grounds of the opposition to the certificate were (among others) that the bankrupt had concealed and made away with his property, and had attempted to account for large sums of money by untruly stating that he had got tipsy and lost them.

By the order under appeal the commissioner awarded the bankrupt a certificate of the third class, subject to the suspension thereof for six calendar months from the 3d of November, 1855, and gave protection to the bankrupt at the expiration of one calendar month from the last-mentioned date.

Mr. Selwyn, in support of the appeal.

The bankrupt had been served, but did not appear.

THE LORD JUSTICE KNIGHT BRUCE. — Where a bankrupt is shown to have been negligent or careless, rash or improvident, in the conduct of his business, or in the management of his affairs, or has been shown to have been unduly lavish in his expenditure, these are circumstances not without importance on the question whether he shall have any certificate, and, if * any, of * 782 what class, and whether subject to conditions. But each particular case of such a kind must depend on its own facts, as to which it is inevitable, or almost inevitable, that differences of opinion should exist. Where, however, there has been wilful falsehood or dishonesty, we have thought it especially due to the interests of society to be more severe than with a view only to the particular

cases it might have been necessary to be. I do not recollect any instance where wilful falsehood or sheer dishonesty has been proved against a bankrupt in which we have granted a certificate. The present case belongs to the latter class. The bankrupt has been proved to have been guilty of wilful falsehood as to the state of his affairs; to have been guilty of intentional concealment of property for the purpose of defeating his creditors, and to have committed other offences which the gravity of those that I have referred to makes it needless to mention. If we were to allow him a certificate, we should contradict our whole practice.

THE LORD JUSTICE TURNER. — This Court has never failed to visit upon a bankrupt against whom any case of fraud or falsehood is established, the most severe penalties. If we have erred in such cases, it has been against and not in favour of the bankrupt. In this case it is impossible to believe what the bankrupt says as to the disposal of the surplus proceeds of the sale of the ship; and it is as clear that there was an attempt to defraud his creditors by a fraudulent removal of his goods. Under these circumstances it is impossible to maintain the certificate. The certificate must be refused. The assignees will take their costs out of the estate.

In the Matter of THOMAS SELBY and SILAS NORTON.

1855. December 7. Before the LORDS JUSTICES.

Want of fidelity in a solicitor cannot, upon a question of certificate, be visited with merely slight penalties, and public interest being concerned in the matter, no private dealing can amount to a condonation of the offence.

Where, therefore, solicitors received a client's money, to be invested on good security, and applied it in repaying to one of them a sum which he had advanced on a mortgage of a reversionary interest in a trust fund (a transfer of the security to the client being prepared), and afterwards the transferor, who was one of the trustees of the trust fund, procured the concurrence of the *cestuis que trustent*, and also of his co-trustee (to whom he never disclosed the transfer), in selling out the fund, and thus realized the mortgage money and applied it to his own use, but continued to pay the interest to the client,

to whom he represented the mortgage as still subsisting: *Held*, the solicitor having become bankrupt, that his certificate had been properly refused, and that the client's having continued to correspond with him after discovering the misconduct did not alter the case.

THIS was the appeal of one of the bankrupts from the refusal of his certificate by Mr. Commissioner EVANS.

In March, 1828, the bankrupt Thomas Selby and his brother George Selby entered into partnership as solicitors. At that time the bankrupt, Thomas Selby, was entitled to a mortgage debt of 4000*l.*, secured upon a reversionary interest of a Mrs. Shepherd in a sum of 9300*l.*, 3*l.* per cent bank annuities, standing in the names of Thomas Selby and a Mr. Pridham, as trustees of a settlement under which a Mrs. Hotchkiss was entitled to the dividends for her life, and after her decease Mrs. Shepherd was entitled absolutely to the principal. At the time of the formation of the partnership Mr. George Selby had a client named Hodges, the present respondent, who, after the formation of the partnership, employed the firm as his solicitors, Mr. George Selby, however, continuing to attend to Mr. Hodges's affairs. In July, *1828, *784 George Selby asked Mr. Hodges to advance 4000*l.* to a Mrs. Shepherd on good mortgage security. Mr. Hodges consented, and paid 4000*l.* into the hands of Mr. George Selby. Mr. George Selby continued to pay interest on this amount to Mr. Hodges till the dissolution of the partnership in March, 1844. After that time Thomas Selby carried on the business alone, and until March, 1850, paid the interest regularly to Mr. Hodges, who had never in the mean time made any inquiry as to the security. In March, 1850, however, a settlement of accounts connected with other matters took place between Mr. Hodges and the Selbys, and Mr. Staniland acted on that occasion as Mr. Hodges's solicitor. On the 16th of March an interview took place between Mr. Thomas Selby and Mr. Staniland with reference to these accounts, and Mr. Staniland in his deposition thus stated what then passed: "Mr. Hodges gave me a list of deeds and securities, which he desired should be given up by the bankrupt and Mr. George Selby, which included Shepherd's security. On the 16th of March, 1850, I saw the bankrupt, and gave him the list I received from Mr. Hodges. We went through the list, and Mr. Thomas Selby said that Shepherd's was a mortgage security for 4000*l.*, and would be paid off at any time on six months' notice. He promised to send the

securities to Mr. Hodges. . . . On 26th March, 1850, the engrossments were sent to me, with an appointment to complete on the 28th March, 1850. Previously to this, I had seen Mr. Hodges, and he told me that he had received part of the deeds from Thomas Selby. On the 28th March, 1850, Mr. Hodges, Mr. George Selby, and the bankrupt met at my office to complete. The bankrupt and Mr. George Selby were in a separate room. Before the deeds were executed, I spoke to the bankrupt and his brother about the remainder of Mr. Hodges's deeds, and they promised they * 785 should be sent to him. Neither the bankrupt nor * his brother on that occasion said any thing to me about the 4000*l.* having been received, or about Mrs. Shepherd being dead."

Mr. Hodges deposed that he had afterwards frequently asked the bankrupt for the rest of his securities, and particularly for Mrs. Shepherd's deeds, but that the bankrupt always evaded delivering them, and that at length, at an interview which took place between the bankrupt and Mr. Hodges by appointment on the 2d of August, 1850, Mr. Hodges asked the bankrupt for Mrs. Shepherd's deeds. The bankrupt said, "I have none. The cash was lent through me. I had the money. Mrs. Shepherd died the year after the money was lent by me." Mr. Hodges replied, "Then pay me the money." The bankrupt said he could not. Mr. Hodges said, "If I had known this at the time, I never would have taken you as surety for your brother in the bond for 21,000*l.* and upwards." After this Mr. Hodges continued to apply to the bankrupt for payment of the 4000*l.*, but without success. He often promised to pay Mr. Hodges, but only paid the interest.

Subsequent correspondence between Mr. Hodges and the bankrupt was in evidence, in which Mr. Hodges addressed the bankrupt as "Dear Sir," and expressed himself courteously towards him, and frequently pressed for payment of the 4000*l.*, or security for it.

It appeared in evidence, that the transactions respecting the 4000*l.* had really been the following. The settlement, and other deeds and documents relating to the trusts, remained in the custody of Messrs. Selby. A transfer of the mortgage debt of 4000*l.* from Mr. Thomas Selby to Mr. Hodges had been prepared and stamped, but it did not clearly appear whether it had been * 786 actually * executed. In October, 1827, Mrs. Shepherd died intestate, leaving Mrs. Hotchkiss the tenant for life, surviv-

ing her. On the 1st of December, 1829 (no notice having been given by Thomas Selby to his co-trustee, Mr. Pridham, of the transfer of the mortgage of 4000*l.*), an arrangement was come to between Mrs. Hotchkiss (the tenant for life), the administrator of Mrs. Shepherd, and Mr. Thomas Selby, as mortgagee, and Mr. Pridham, that the 9300*l.* stock should be sold out: that 2682*l.* 16*s.*, part of the proceeds, should be paid to the administrator; and that the residue should be paid to Mr. Thomas Selby as mortgagee, he paying to Mrs. Hotchkiss 300*l.* per annum, during her life in respect of her life-interest. This arrangement was carried into effect; a release was executed to the trustees, and the annuity of 300*l.* was paid to Mrs. Hotchkiss by Thomas Selby till her death, which took place in 1838. The portion of the proceeds of the stock paid to Thomas Selby was applied to his own use or that of the partnership.

The other material facts appear sufficiently from the judgments.

Mr. Swanston and *Mr. Fooks*, in support of the appeal. — The conduct of the bankrupt has not been such as to deserve the severe sentence passed upon him. In the first place, the transfer does not appear to have been ever completed, and if this was so, there is an end of the question as to the nature of the securities, and the case is reduced to one in which a solicitor receives money to be invested, and, while waiting for an eligible investment, pays interest upon it. But if the money be taken to have been invested on the transfer of the reversionary mortgage, all that can be said is, that the bankrupt has been * guilty of imprudence. * 787 He cannot be charged with intentional dishonesty. When he received the 4000*l.*, out of the proceeds of the stock which was sold out, he was in good circumstances, and although, on the hypothesis of the transfer having been executed, he ought to have acquainted Mr. Hodges that the security was at an end, and have taken his instructions as to obtaining another or repaying the money; yet his delay in doing this is an inattention of not unfrequent occurrence in large matters of business. Both Mr. Hodges and his solicitors had on hand many matters of greater magnitude and importance, so that it was the less surprising that this should have been postponed. Mr. Hodges never inquired about the security, and if the bankrupt had told him that he held it on his per-

sonal security, Mr. Hodges would have been perfectly satisfied. This appears clearly from Mr. Hodges's subsequent conduct; for, after ascertaining in 1850 what had really taken place, he did not treat it as an impropriety, but merely pressed for repayment. If, therefore, there had actually been an offence committed, it must, looking at the length of time (upwards of a quarter of a century) since its occurrence, and at the conduct of Mr. Hodges since he became acquainted with it, be treated as having been condoned.

Mr. Bacon and Mr. De Gez, for Mr. Hodges. — In the first place it was a gross breach of the duty of the bankrupt and his partner as Mr. Hodges's solicitors, to advance their client's money on a security of the bankrupt's own, and of an insufficient and improper description, without consulting him or informing him that it was the bankrupt's own security. But that grave fault sinks into insignificance, compared with the offence subsequently committed. After the agreement to transfer the security to

* 788 Mr. Hodges, whether the deed of transfer * was executed or not, the bankrupt held the title-deeds as Mr. Hodges's solicitor, and his afterwards dealing with them and obtaining money for himself by means of them was, if not an embezzlement, within the 7 & 8 Geo. 4, c. 29, § 49, undistinguishable from that crime in principle and substance. The argument as to condonation (a term now for the first time sought to be applied to the considerations of public justice connected with the allowance of a bankrupt's certificate) can have no place on such a question. If it could, it does not appear that Mr. Hodges was ever fully aware, before the bankruptcy, of the real nature of the act which the bankrupt had committed; nor does it appear that Mr. Hodges ever agreed to overlook even what he was suffered to know. His merely using ordinary terms of courtesy in correspondence cannot be so construed. It is of at least as much importance to society that solicitors should conduct themselves with honesty and integrity as that bankers should do so, and consequently the grounds on which *Ex parte Rufford* (a) and *Ex parte Sturt* (b) were decided are fully applicable to the present case.

Mr. Martindale, for the assignees, took no part in the discussion.

(a) 2 De G., M. & G. 234.

(b) 4 De G. & Sm. 49.

Mr. Swanston, in reply.

THE LORD JUSTICE KNIGHT BRUCE. — A certificate under a bankruptcy is not a matter of right, but a matter of discretion, a discretion, I agree, to be exercised on judicial principles; but the case of a certificate is one in which those judicial principles involve the duty of attending to the public interest and the * claims of society, at least as much as in any other class * 789 of cases coming under the consideration of this Court. How I should have been disposed to deal with the present matter, if only private interests had been concerned, it is unnecessary to say, for more than private interest is here to be attended to. The ground on which the certificate has been opposed, is want of fidelity in a solicitor to his client, a relation morally, legally, and equitably imposing upon the solicitor obligations which, if we were to treat as lax, as liable to be broken lightly, and without more than slight penalties and trivial consequences, we should be incurring a heavier responsibility to society than we, or any judicial person, would willingly incur. The short facts of the case are these: Thomas Selby and George Selby were in partnership together as solicitors. Thomas Selby was a co-trustee with Mr. Pridham of a large sum of stock standing in the names of Thomas Selby and Mr. Pridham, as trustees for an aged lady of the name of Hotchkiss for her life, and subject to that life-interest for her daughter Mrs. Shepherd absolutely. Mrs. Shepherd had, in 1827, mortgaged her reversionary interest to Thomas Selby, for securing 4000*l.* and interest. The firm had also a client named Hodges, a gentleman seemingly of considerable property, who appears to have placed much confidence in George Selby, to have been particularly intimate with him, and to have employed him mainly, if not in a certain sense solely, in the transaction of his legal business. Still all this legal business was transacted by George Selby, as a member of the firm, and not in any material sense in a distinct character. In 1828, a sum of 4000*l.* was transmitted, by Mr. Hodges to George Selby, for the purpose of being invested on good security. The manner in which that sum was applied was this: Thomas Selby and George Selby, both knowing the purpose for which the money was intrusted to them, or to one of them (it matters not * which), took it for themselves, or applied * 790 it for the purposes of themselves, or one of them, under the

guise and in the shape of an investment, on the very imperfect security (a security very objectionable, at least if any better was obtainable) which Thomas Selby had for the same amount from Mrs. Shepherd. Accordingly, it is to be inferred, that Thomas Selby executed a deed, transferring this imperfect, this bad security of his to Mr. Hodges. The sum of 4000*l.*, treated as thus lent, was applied to the purposes of the partners, or one of them, and the money is gone. And as if to make the matter worse, if worse it could be made, notice of the mortgage was not given to the co-trustee, Mr. Pridham, who was allowed to remain in ignorance of it. Nor was Mr. Hodges informed of the nature of the security, as to which, however, he does not appear to have been anxious or desirous to know any thing. He made no particular inquiries about his money, but was informed that it was invested on security, and the interest was paid to him from time to time. The sale of stock to which I am about to refer, took place in the year 1829, the year following the transfer. Mrs. Shepherd died, and her interest in the stock became vested in her personal representatives. It became desirable for family purposes, that the stock should be sold and the proceeds applied; and, so far as Mr. Pridham knew, the only persons interested in it were the tenant for life, the representatives of Mrs. Shepherd, and Mr. Thomas Selby, his co-trustee. Accordingly, on the consent of those persons being given, Mr. Pridham could not hesitate, and the stock was sold out and the produce applied, so that the real incumbrancer, Mr. Hodges, never obtained any part of the proceeds. All this was done without obtaining permission from him, without consulting him, and without his knowledge; and the firm, including

Thomas Selby, continued to treat him as having his money
 * 791 placed out on * this security, by paying him interest as on the mortgage, a state of things which continued to 1850.

Comment is needless on such a transaction: it was a breach of every, or almost of every, duty which, as respects property, a solicitor owes to his client; a malversation of a most serious description; and if it does not come within the 7 & 8 Geo. 4, c. 29, § 49, a point to which reference was made in the argument, and on which I give no opinion, it barely escapes from the provisions of that statute, and, morally, is not better than some cases clearly falling within the enactment. In 1850, some four years before the bankruptcy, the matter was discovered by Mr. Hodges,

in consequence of some disputes which arose between him and George Selby. He then demands his money. He does not sue, but does not treat the act as a crime. In 1854, the bankruptcy occurs with a frightful deficiency of assets; the difference between the amount of the debts for which Thomas Selby is liable, and that of the assets applicable to their payment, being not less than 120,000*l*. Looking at the debts of Selby & Selby, Selby & Norton, and Thomas Selby, the amount of the dividend to which Mr. Hodges will be entitled on the sum which he was told was secured, need not be stated.

Under these circumstances the commissioner considered it impossible to grant a certificate. I think that if he had granted one, it would have been of bad example, would have held out a suggestion to solicitors, that they might with substantial impunity violate very important duties which they owe to their clients. The matter is brought here on appeal, and, after what I have stated, I need say no more as to what our duty is. The case is a very painful one. There appears to be no other imputation upon Thomas Selby, who seems for no short time to have enjoyed the esteem of society. He unfortunately, however, gave way to temptation, and fell * into an error which I feel it impossible to overlook or * 792 treat lightly.

Various considerations have induced me of late to doubt whether the decisions of this Court in certificate cases, during the last ten years, have not been, not too lenient, but too severe, and I have, therefore, reviewed them from time to time, under the influence of that doubt, as carefully as I could, and, although I am perfectly satisfied, so far as my judgment extends, that in no instance have they been too lenient, I have also persuaded myself, though with less confidence, that they have not been too severe. I should be departing from the rules by which this jurisdiction has been guided, if I were to accede to any alteration of the decision of the learned commissioner in the present instance. I am, therefore, of opinion, that this petition must be dismissed.

THE LORD JUSTICE TURNER. — The exercise of this jurisdiction is always painful, and not less so in a case like the present, considering the position in society of this unfortunate gentleman. Our duty, however, is not to permit any private feelings to weigh

against the discharge of a public duty, and I look upon this case as one of great importance as regards the interests of the public. There is nothing in which the public is more interested than in the character and conduct of solicitors, who have the property of so many persons in their power.

What are the facts here? A client transmitted to one of the partners 4000*l.* for the purpose of being invested on good mortgage security. The other partner had a mortgage on a reversionary interest in stock for 4000*l.*, and the money was handed

* 793 over to him on a transfer of * that security. Now, I do not

mean to say that this of itself would deserve the punishment which has been inflicted; but I hope that, in saying that such a case might not deserve this extreme punishment, I shall not be understood to countenance any notion that it was not the duty of both the solicitors, before they lent their client's money on this security, to have his sanction to such an investment. What followed? The solicitor, who had the money, became a trustee of the settlement, sold out the trust fund, received the proceeds, and never communicated that fact to his client, but paid interest for twenty years, as if the money remained invested on the original security. In 1850, he was applied to for the deeds. On that application being made, he told his client that the money might at any time be called in at six months' notice. Mr. Hodges, in his evidence before the commissioner, stated that he had frequently after 28th March, 1850, asked the bankrupt for the deeds, but he evaded delivering them; and on the evidence of Mr. Staniland there is this statement: [His Lordship read it as set out, *ante*, p. 784.] Again, in his cross-examination, he says, "Mr. Thomas Selby told me that Mrs. Shepherd's security would be paid off at any time on six months' notice." It has been said that the bankrupt could contradict all this; but it is observable that the bankrupt was examined before the commissioner on the 9th of November, after this statement had been made, and did not contradict it. The facts must, therefore, be considered as proved.

It was then urged that there had been a condonation, that Hodges had treated the matter as a mere question of debt; but it is a new doctrine that, where the public interest is concerned, any private dealing can amount to a condonation. The question is, whether the bankrupt is to be permitted to go into the world,

free to carry on *business, without any liability to his * 794 former creditors; and in deciding this question, the interests of society are to be looked to.

It has been said that there are extenuating circumstances, and I should be glad if I could find this to be the case. It was contended that dishonesty was not intended, for that both the partners were solvent and wealthy at the time; but if we acceded to that argument, we should be holding that the discharge of a solicitor's duty to his client is less binding on a solvent than on an insolvent solicitor. On the point of concealment nothing has been, nothing can be said in extenuation of the bankrupt's conduct. It is also said that there are degrees in false representations, and that the case might have been worse; but I cannot permit it to be said that the Court expects from a solicitor any thing less than a strict performance of his duty.

I regret to find it impossible to depart from the commissioner's decision.

* *Ex parte* THOMAS BARNEWALL, WILLIAM BLOUNT, * 795
CHARLES WELD, MICHAEL ELLISON, and GEORGE
CHARLWOOD.

In the Matter of ANTHONY GEORGE WRIGHT BIDDULPH,
JOHN WRIGHT, HENRY ROBINSON, and EDMUND
WILLIAM JERNINGHAM, Bankrupts.

WRIGHT'S EXECUTORS' CASE.

1855. December 7. Before the LORDS JUSTICES.

Where two of a firm of bankers had drawn out a balance standing to the account of customers in the character of executors, and had invested it in the names of themselves and two other trustees upon an unauthorized security: *Held*, on the bankruptcy of the bankers, not to be a case for double proof against the joint estate and the separate estates of the two partners.

THIS was the appeal of the assignees of the above-named bankrupts from the admission of a proof on behalf of the respondent Anthony George Wright Biddulph.

The respondent, who was one of the bankrupts, had some time since obtained his certificate, and had subsequently become the purchaser of the beneficial interest in respect of which he had made the proof in question.

The circumstances of the case are fully stated in *Ex parte Burton*, (a) down to the date of that report, and may be thus shortly recapitulated.

Anthony Wright, by his will, dated the 12th of August, 1785, appointed Edmund Plowden and three other persons, who died in Mr. Plowden's lifetime, his executors, and gave them his residuary personal estate in trust for investment on mortgages of freehold or copyhold lands of inheritance in England, and then to be held

in trust for the respondent for life, with remainder to such * 796 son of * his as should first attain twenty-one absolutely.

The testator died in 1786. The trustees kept a banking account with the bankrupts (who were bankers), headed "Executors of Anthony Wright, Esq." On the 8th of May, 1834, John Wright and E. W. Jerningham, two of the bankrupts, took upon themselves to invest 7000*l.*, part of the balance standing to the credit of the above account, without the consent of Mr. Plowden (the then surviving trustee), together with other moneys belonging to other trusts (b), upon the security of an equity of redemption of the undertaking of the River Stort Navigation, with the tolls, boats, and machinery belonging thereto, subject to two prior mortgages, one for 40,000*l.*, and the other for 5000*l.* This security was taken in the name of John Wright, Edmund William Jerningham, and two other trustees, all of whom subsequently executed a deed-poll, dated the 31st of May, 1836, declaring that the moneys paid by them upon the conveyance of the equity of redemption belonged, as to 7000*l.* part thereof, to the persons therein named, as trustees and executors of the will of Anthony Wright deceased.

On the 17th of December, 1840, the *fiat* issued, and in 1843 the petition was presented, the hearing on which is reported in *Ex parte Burton*. (a) No proof was made under the liberty then given, but in 1849 the respondent's only son, then an infant, presented a petition under the bankruptcy that the petitioner or some person to be appointed guardian for that purpose, or the executors

(a) 3 Mont., Dea. & De Gex, 364.

(b) See the next case.

of Mr. Plowden, might be at liberty to go in and to prove against the joint estate of the bankrupts, as well as against the separate estates of the three bankrupts, in respect of the breach of trust committed by the investment of the 7000*l.*, without prejudice to the interests of the petitioner and the executors in the securities.

* An order was made on this petition that the executors * 797 of Mr. Plowden should be at liberty to go in and prove against the joint estate, and that the petition should in other respects stand over.

The executors accordingly went in and proved against the joint estate for 7000*l.*

The assignees, being dissatisfied with the admission of this proof, presented a petition to have it expunged or reduced, and their petition came on to be heard, together with the further hearing of the infant's petition.

The case is reported on one point discussed at the hearing of these petitions in 3 De Gex & Smale. (*a*)

An order was made on these petitions on the 6th of June, 1849, whereby the petition of the assignees, so far as it sought to expunge or reduce the proof for 7000*l.*, was dismissed, and it was ordered that the amount of any dividend or dividends to be declared on such proof, when carried to the dividend account, should be transferred in the Bank of England by the accountant in bankruptcy to the credit of the above matter, to an account to be entitled "The Account of the Proof for 7000*l.* by the Executors of Edmund Plowden, Esq., deceased," and the accountant was to cancel any dividend warrants drawn for such dividend or dividends. And it was ordered that the said dividends, when so paid into the bank, should be laid out in the purchase of bank 3*l.* per cent annuities, in trust in the above matter the like account, and that the dividends should be accumulated. And it was ordered that the infant petitioner, Anthony John Wright * Biddulph, by his * 798 guardian, should be at liberty to go in under the *fiat*, and tender and make such amount of proof as he could establish against the separate estates of the bankrupts, John Wright and Edmund William Jerningham, in respect of the debt alleged by the infant's petition to be due to the infant petitioner from the

estates of the bankrupts, John Wright and Edmund William Jerningham, and be admitted a creditor thereunder for what he should so prove.

The infant attained twenty-one in 1851, and died in January, 1854, and on the 15th of March, 1852, the respondent (who had then obtained his certificate) bought back his life-interest from the representatives of a purchaser who had bought it from the assignees.

By an indenture dated the 5th of December, 1851, and made between the then surviving executors of Mr. Plowden and Anthony Wright of the one part, and the respondent of the other part, Mr. Plowden's surviving executors assigned unto the respondent, his executors, administrators, and assigns, the 7000*l.*, and the benefit of all securities for the same.

In a suit (*a*) in Chancery, instituted for the purpose of ascertaining the priorities of the persons interested under the security of May, 1834, the respondent had received 4721*l.* 8*s.* 3*d.* out of the proceeds of the property comprised in the securities in respect of the 7000*l.* advanced by John Wright and Edmund William Jerningham.

On the 6th of November, 1855, the order under appeal was made, whereby the respondent was admitted to prove against * 799 the separate estate of Edmund William Jerningham * for 1460*l.* 1*s.* 11*d.*, being the balance of a sum of 6185*l.* 11*s.* found due to him for principal and interest by the chief clerk's certificate in the Chancery suit, after deducting therefrom 4721*l.* 8*s.* 3*d.* received by him in that suit.

The petition of appeal prayed that this proof might be expunged.

Mr. Amphlett and *Mr. Ellison*, for the appellants. — They contended that no case was made out for double proof.

Mr. Bacon and *Mr. Cracknell*, for the respondent. — The proof against the joint estate was merely in respect of the balance due from the bankers, on the account between them and the surviving trustee as their customer. The proof against the separate estate is in respect of a totally distinct transaction, namely, the breach of trust committed by two of the bankrupts, by personally and

(*a*) See the next case.

individually dealing with trust funds, with knowledge of the trusts, in a manner at variance with them. The rule excluding double proofs (which, though followed, has been always reprobated) has never been extended to such a case as this. Moreover, this is not strictly a joint and separate debt. The joint debt is due from all the bankrupts, the separate debts only from two of them.

Mr. Amphlett, in reply.

THE LORD JUSTICE KNIGHT BRUCE. — The order of 1849 has been relied upon, but I did not, by that order, intend to encourage any notion that in this * case there could be a * 800 dividend from the joint as well as from the separate estate. I am satisfied that there cannot here be a double dividend, and that the circumstances relied upon afford no ground on which this case can be withdrawn from the general rule excluding a double proof.

THE LORD JUSTICE TURNER. — In *Ex parte Bevan*, (a) Lord ELDON said, “ I never could see why a creditor having both a joint and several security should not go against both estates. But it is settled that he must elect.” I think it impossible to disturb the rule so laid down, or to hold this case not to fall within it.

An order was made which directed as follows : The respondent, by his counsel, electing that the proof by the executors of Edmund Plowden, for 7000*l.* made against the joint estate of the bankrupts as in the petition mentioned shall stand, this Court doth order that the proof for the sum of 1460*l.* 1*s.* 11*d.* made against the separate estate of the said E. W. Jerningham, as in the petition mentioned be, and the same is hereby expunged from the proceedings, had and taken under the *fiat*, awarded and issued against the bankrupts. And it is ordered that the costs of all parties of and occasioned by this application be paid out of the separate estate of E. W. Jerningham.

(a) 10 Ves. 109.

* 801 * *Ex parte* THOMAS BARNEWALL, WILLIAM BLOUNT, CHARLES WELD, MICHAEL ELLISON, and GEORGE CHARLWOOD.

In the Matter of ANTHONY GEORGE WRIGHT BIDDULPH, JOHN WRIGHT, HENRY ROBINSON, and EDMUND WILLIAM JERNINGHAM, Bankrupts.

THE COUNTESS DE FRONT'S EXECUTORS' CASE.

1855. December 7. Before the LORDS JUSTICES.

Executors had a balance in that character with bankers, who (with the executors' consent) invested part of it on securities not of a proper description for an investment by executors. The bankers made no inquiry as to the power of the executors to make the investment, but if they had made the inquiry, all the information which they would probably have been able to obtain, would have shown that the executors were residuary legatees, and that the balance was a part of the clear residue. The fact, however, was, that the investment was a breach of trust, there being a codicil which the executors had kept back, but afterwards proved, constituting them trustees only: *Held*, on the bankers becoming bankrupt, that they had not so participated in the breach of trust as to entitle the *cestuis que trustent* to prove against their separate estates.

THIS was the appeal of the assignees from the admission of a proof against the separate estate of Edmund William Jerningham, one of the above-named bankrupts.

The bankrupts had carried on business in partnership as bankers, and the proof in question was made by the legal personal representative of Mary Winifred Countess St. Martin de Front, who, by her will, dated the 19th of February, 1824, appointed the Rev. Dr. William Victor Fryer, Anthony George Wright Biddulph, and John Wright, two of the bankrupts, her executors, and bequeathed to them the residue of her personal estate.

The testatrix made eight codicils to her will, and by one of the codicils, which bore date the 20th of April, 1824, the testatrix declared that she had bequeathed the residue of personal
 * 802 estate to her executors in trust only, * and not for their own use and benefit; and she thereby directed that they should pay in the first place any sum of money which she might desire to

be paid by some private memorandum in her handwriting, and in the next place that they should pay one moiety of the residue to the Catholic Bishop for the time being of the London District, the Vicar-General of the same district, the President of St. Edmund's College, and to John Gage, of Lincoln's Inn, Esq.; and the other moiety to the Catholic Bishop for the time being of the Midland District, the Vicar-General of the same district, the President of Saint Mary's College, Oxford, and John Gage, Esq.

The testatrix died on the 7th of January, 1830, and her will and all her codicils, except the codicil of the 20th of April, 1824, were proved by the executors in February, 1830; but the codicil of the 20th of April, 1824, was kept back by the executors, and not proved until the 1st of October, 1841, (a) which was after the bankruptcy of Wright & Co.

Shortly after the decease of the testatrix, her executors opened a banking account with the firm of Wright & Co., which was entitled "Executors of the Countess de Front;" and they paid to the credit of the account considerable sums of money belonging to the personal estate of the testatrix, and on the 25th of October, 1834, there was a balance standing to the credit of the account of more than 3000*l*.

Previously to 1832, Sir Geo. Duckett, who was an * inti- * 803 mate friend of the bankrupt John Wright, had become a bankrupt, and the equity of redemption in the undertaking of the navigation of the River Stort and Hertford Union Canal Company, subject to two mortgages, one for 40,000*l*. and the other for 5000*l*., had become vested in the assignees under his bankruptcy as part of his estate. In the year 1834, Sir Geo. Duckett, who had obtained his certificate, being desirous that the equity of redemption should be repurchased from his assignees for the benefit of himself and his family, applied to John Wright to assist him in so doing out of the moneys of the firm of Wright & Co., which he agreed to do.

It was accordingly arranged that Sir George Duckett's assignees should sell the equity of redemption for 17,200*l*., and that one Francis Giles should advance 3000*l*. towards the purchase-money, and that John Wright, out of the moneys of the firm of Wright &

(a) In the mean time the Act 2 & 3 Will. 4, c. 115, had passed, giving validity to gifts for Roman Catholic charitable purposes, and had been held to be retrospective. See *Bradshaw v. Tasker*, 2 Myl. & K. 221.

Co., should advance 14,200*l.* to complete the purchase, and a further sum of 800*l.* for certain expenses attending the arrangement, making together 15,000*l.*; and that the advances should be secured on the equity of redemption, when purchased in manner hereinafter mentioned.

It was not convenient for the firm of Wright & Co. to make the advance of 15,000*l.* for any considerable time, and it was therefore arranged that the firm should make the advance in the first instance, but that John Wright should, as soon as possible, procure other persons to relieve the firm from the same.

Edmund William Jerningham, another of the bankrupts, was requested by John Wright to become a trustee in conjunction with John Wright, Sir Geo. Duckett, and Francis Giles, of the equity of redemption, for the purposes of the arrangement, and * 804 also a trustee, in conjunction * with John Wright, of the sum of 15,000*l.* to be advanced in the first instance by the firm, and afterwards to be taken by the other parties as aforesaid; and he consented so to do.

In pursuance of this arrangement, and in consideration of the sum of 17,200*l.* paid to the assignees of Sir Geo. Duckett, — as to 3000*l.* by Francis Giles, and as to the remaining 14,200*l.* out of the moneys of the banking firm, the equity of redemption was by several indentures of lease and release, dated respectively the 7th and 8th of May, 1834, and by a deed-poll, dated the 8th of May, 1834, conveyed and assured, according to the respective natures of the several particulars of which the same consisted, subject to the several mortgages thereon, unto and to the use of John Wright, Edmund William Jerningham, Sir Geo. Duckett, and Francis Giles, their heirs and assigns, upon the trusts of the indenture next hereinafter stated.

By an indenture dated the 8th of May, 1834, and made between Sir Geo. Duckett and Dame Isabella his wife of the one part, and John Wright, Edmund William Jerningham, Sir Geo. Duckett, and Francis Giles of the other part, after reciting the several indentures of lease and release and deed-poll, and reciting, amongst other things, that the sum of 17,200*l.*, the consideration mentioned in the indentures and deed-poll, was in fact paid by John Wright, Edmund William Jerningham, and Francis Giles alone, and that the three last-named persons had applied the further sum of 800*l.* (making together 18,000*l.*) towards payment of certain expenses

attending the aforesaid conveyances, and that 3000*l.*, part of the 18,000*l.* so paid and expended as aforesaid, was advanced by Francis Giles, and that the remaining 15,000*l.* was advanced by John Wright and Edmund * William Jerningham; and * 805 that it was agreed that both of them should receive interest as follows, viz., interest at 5*l.* per cent on the 3000*l.*, and at 4*l.* 10*s.* per cent on the 15,000*l.*, and that Francis Giles should have priority over John Wright and Edmund William Jerningham in payment of the several sums and interest, certain trusts were declared for the purpose of securing in manner therein mentioned the sum of 3000*l.* and interest to Francis Giles, and the sum of 15,000*l.* and interest to John Wright and Edmund William Jerningham.

The 15,000*l.* was, in fact, advanced, not by Edmund William Jerningham and John Wright, as mentioned in the last-mentioned indenture, but by John Wright alone out of the moneys of the banking firm, and in accordance with the above arrangement in that respect. Afterwards John Wright proceeded to find persons who would relieve the firm therefrom, and he accordingly applied to and obtained the consent of one Peter Campbell, who had an account with the firm, to take 5000*l.* of the 15,000*l.*, and the account of Peter Campbell was accordingly, on the 8th of May, 1834, debited with 5000*l.* as paid to the trustees of Sir George Duckett.

In like manner John Wright advanced, or professed to advance, 7000*l.* further part of the 15,000*l.*, out of moneys belonging to the estate of one Anthony Wright deceased, (a) and then standing to an account in the books of the firm, entitled "Executors of Anthony Wright, Esq.," and he accordingly, on the 8th of May, 1834, caused the last-mentioned account to be debited with the 7000*l.*, as paid to the trustees of Sir George Duckett.

As to the 3000*l.*, the remaining part of the 15,000*l.*, * John Wright proposed to advance the same out of the * 806 moneys belonging to the estate of the Countess de Front, which were then expected to be, and were, in fact, paid in to the aforesaid account in the books of the firm, entitled "Executors of the Countess de Front," and he accordingly, with the consent of Anthony George Wright Biddulph, and, as was presumed, of his

(a) See the last preceding case.

other co-executor, Dr. William Victor Fryer, caused the last-mentioned account to be debited, on the 25th of October, 1834, with the sum of 3000*l*.

All the details of this arrangement were carried out by John Wright, and Edmund William Jerningham did not interfere therein, except in executing such deeds as he was informed by John Wright were necessary. In the year 1836 John Wright, without any previous communication with Edmund William Jerningham, caused a deed-poll to be prepared for declaring the trusts and priorities of the several sums of 5000*l*., 7000*l*., and 3000*l*. into which the 15,000*l*. had been divided, and Edmund William Jerningham, at the request of John Wright, executed the same as well as John Wright.

By the last-mentioned deed-poll, which bore date the 31st of May, 1836, after reciting (amongst other things) that the sum of 15,000*l*., which in and by the last-mentioned indenture was stated to be due to John Wright and Edmund William Jerningham, was not, in fact, their own proper moneys, but that the same was the proper money of and belonging to the following persons in the proportions, and was advanced by them according to the priorities thereafter mentioned, that was to say, the sum of 3000*l*., part thereof, belonging to and was the proper money of Anthony George Wright Biddulph and John Wright and the Rev. Dr. Fryer, as

trustees under the will of the late Countess de Front de-
 * 807 ceased, the sum * of 5000*l*., other part of the 15,000*l*., was the proper money of and belonged to Peter Campbell, and 7000*l*., the remainder of the 15,000*l*., was the proper money of and belonged to Edmund Plowden, Anthony George Wright Biddulph, and John Wright, as trustees and executors of the will of Anthony Wright, deceased; and further reciting, that several parties who were so entitled to the 15,000*l*. secured as aforesaid, were desirous that John Wright and Edmund William Jerningham should execute and give to them a declaration of trust of their respective rights and interests in the 15,000*l*., which they, John Wright and Edmund William Jerningham, had agreed to do in manner thereafter mentioned; it was witnessed, that in pursuance of the desire and agreement they, John Wright and Edward William Jerningham, did thereby jointly and severally covenant, declare, and agree to and with all and every persons and person whom it might concern, that they, the said John Wright and

Edmund William Jerningham, would stand possessed of and interested in the 15,000*l.* so due and owing and secured to them as aforesaid, and the interest which had been paid or accrued due thereon, in the proportions and according to the priority, and in manner thereafter stated, that is to say, as to the sum of 3000*l.*, part of the 15,000*l.*, and the interest thereof, in trust for Anthony George Wright Biddulph, John Wright, and the Rev. Dr. Fryer, as trustees under the will of the Countess de Front, and in priority to the sums of 5000*l.* thereafter next mentioned; and as to the sum of 5000*l.*, further part of the 15,000*l.*, and the interest thereof, in trust for Peter Campbell, his executors, administrators, and assigns, in priority to the sum of 7000*l.* next thereafter mentioned; and as to the sum of 7000*l.*, the remainder of the 15,000*l.*, and the interest thereof, in trust for Edmund Plowden, Anthony George Wright Biddulph, and John Wright, as trustees and executors of the will of Anthony Wright * deceased, to be * 808 taken and paid after full payment and satisfaction of the sums of 3000*l.* and 5000*l.*

According to the respondent's evidence, Edmund William Jerningham had not executed the last-mentioned deed-poll, nor, in fact, at any time prior to the issuing of the *fiat*, any cognizance of the trusts to which the moneys standing to the credit of the executors of the Countess de Front were subject.

The *fiat* issued on the 17th of December, 1840.

At the date of the issuing of the *fiat* the 3000*l.*, part of the residuary estate of the Countess de Front, deceased, was outstanding upon the security aforesaid, and a considerable sum was due from the bankrupts on the account entitled "Executors of the Countess de Front." Dr. Fryer, as the then solvent executor of the countess, made a proof against the joint estate of the bankrupts for the sum of 4806*l.* 1*s.* 5*d.*, and for the purpose of making such proof, the sum of 3000*l.* so lent on the mortgage security was allowed in account to the firm, and in diminution of the balance which would otherwise have been due from the firm to the estate of the countess.

Dr. Fryer died in September, 1843.

In 1852, a suit in Chancery was instituted by Anthony John Wright Biddulph, to have the respective priorities of the several other parties interested in the 15,000*l.* and interest secured by the indenture of the 8th of May, 1834, ascertained, and the trusts

of the deed carried into execution under the direction of the Court.

By an order, on further consideration, made in this suit on the 1st of July, 1854, after directing payment of certain * 809 * costs, it was referred to the chief clerk to ascertain and certify the amounts remaining due to the several parties interested in the fund, and it was ordered, that out of the cash which would be remaining to the credit of the cause after the payments previously directed, the amount which should be certified to be due should be paid to the respective parties.

Under this order 2023*l.* 9*s.* 5*d.* had been paid on account of the sum of 3000*l.* and interest, due to the estate of the Countess de Front.

John Wright died in January, 1855, and his executor, as the personal representative of the countess, had tendered against the separate estate of Edmund William Jerningham the proof now in dispute, which was for 1819*l.* 16*s.* 3*d.*, being the balance of the 3000*l.* and interest, after deducting therefrom the 2023*l.* 9*s.* 5*d.* received under the decree.

The appellants prayed by their petition of appeal that the proof might be expunged.

Mr. Amphlett and *Mr. Ellison*, in support of the appeal. — *Mr. Jerningham* had, in fact, no notice of any trust affecting the 3000*l.* But if he had inquired and obtained all the information which he could, what would it have been? Why, that the 3000*l.* formed part of the clear residue of the testatrix's estate, and that Messrs. Biddulph and Wright, and Dr. Fryer, were beneficially entitled to it. For the eighth codicil had not then been proved. The three persons thus beneficially interested all concurred in the * 810 transaction, and consequently no * breach of trust can be considered to have been knowingly committed or participated in by *Mr. Jerningham*.

Mr. Cracknell (with whom was *Mr. Bacon*), for the respondents. — First, even supposing Dr. Fryer to have concurred in the investment, still the executors of the countess were described as such in the banking account, and *Mr. Jerningham* had no right to presume that a transaction of this description was a proper one on

the part of executors. He made no inquiry upon the subject, and, however the case might have stood if he had done all in his power to ascertain whether the transaction, which was *prima facie* a breach of trust, had not really that character, yet as he made no inquiry, and a breach of trust was, in fact, committed, his assignees cannot be heard to allege that if he had made inquiry, he would not have learned the real facts of the case, including the existence of the unproved codicil, and, indeed, the confidence existing between the parties renders it highly probable that he was cognizant of it. At all events, having taken upon himself to deal with a trust fund, in a manner not *prima facie* according to the trust, and not having made any endeavour to ascertain whether the trust really authorized the transaction, he took subject to the liabilities which would affect a trustee regularly appointed. One of these is a joint and separate liability in all who participate in a breach of trust. But, secondly, there is no evidence of the concurrence of Dr. Fryer, and consequently there was a breach of trust independently of the trusts declared by the codicil.

He referred to *Ex parte Gowers* (a) and *Rackham v. Siddall*. (b)

* *Mr. Amphlett*, in reply.

* 811

THE LORD JUSTICE KNIGHT BRUCE. — As the will and the codicils originally proved were the only testamentary instruments proved at the time when the transaction in question took place (the codicil of the 20th of April, which declared the trusts of the residuary estate not having been proved till after the bankruptcy), I think that the assignees are entitled to have the case considered as if the codicil of the 20th of April had never existed. So considering it, I conceive that the executors for every purpose at present material must be treated as residuary legatees merely; and the residuary estate must be regarded as clear, because every charge upon it had been satisfied, except those created by the then unproved codicil. In this view of the case it is reduced to a question, which in favour of the respondents I assume to be material; viz., the question of Dr. Fryer's sanction and adoption of the pro-

(a) 2 Deac. 207.

(b) 1 Mac. & G. 607.

ceeding. I am of opinion, that as Dr. Fryer made the affidavit of 1841 on the occasion of the proof, and as he died in 1843, and the application to prove now under consideration was not made till several years after his death, when by his death every opportunity of obtaining an explanation had been lost, it is just to assume his concurrence throughout. I think, therefore, that no breach of trust has been established against Mr. Jerningham, and that, consequently, the proof against his separate estate must be expunged.

THE LORD JUSTICE TURNER. — I also think that this proof must be expunged. It is a proof against the separate estate of one partner, in respect of money drawn out of an account standing to the credit of customers of the firm, and the ground of * 812 its * admission is, that the partner used the money of the customers, after having had notice that it was trust money, in a manner at variance with the trusts affecting it. I think, however, that the only persons interested in the balance, so far as then appeared, were Mr. Biddulph, Mr. John Wright, and Dr. Fryer. That the two former concurred in the application of the money is beyond all question, and I think that, as Dr. Fryer proved for the balance after deducting the 3000*l.*, he must, in the absence of other evidence, be considered as having adopted the loan. The trust appears to me to have been, for all material purposes, one for the benefit of three persons, of whom two are proved to have concurred in the transaction, and the other must be presumed to have concurred in it. Under these circumstances, I think that the proof cannot stand.

Proof expunged. Costs out of the estate.

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ADVOWSON.

A testator devised to trustees an advowson, in trust to sell upon the death of the then incumbent and to divide the proceeds between seven persons equally as tenants in common: *Held*, on the death of the incumbent, that the right to present was vested in the seven, and they not agreeing among themselves as to its exercise, that it must be determined by lot which of them should nominate the clerk to be then * presented by the trustees. — *Johnstone v. Baber*, 439. * 814

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APPOINTMENT.

Under a marriage settlement, the husband and wife had a power of appointing a fund among their children, and in default of appointment, or so far as it did not extend the fund was to go to the children equally. There were three children of the marriage. An appointment of one-third of the fund was made in favour of one of the children, yet so as not to affect the same power further than to the extent specified, and also, in case of no complete exercise or execution of the same power or authority as to the share of the fund not affected by the appointment, so as

not to prejudice or affect the right or contingent interests of the appointee under the proviso for accruer, in case of the death of any or either of the other children, in such manner as specified in the settlement, and notwithstanding that in case of no complete appointment the then "appointment was intended to be made in lieu of all claims and demands" of the appointee to or for any original or principal share of the fund: *Held*, that the appointors must be taken by necessary implication to have appointed the other two-thirds to their two other children, and that the appointee was not entitled to share in such two-thirds. — *Foster v. Cautley*, 55.

See POWER, 1, 2.

APPROPRIATION OF PAYMENTS.

A. being indebted to B. on three promissory notes was applied to by B. for payment on account of interest, but without referring to any debt in particular: in consequence of this application A. paid 5*l.*: at the time of this payment two of the notes were barred by the Statute of Limitations, and one was not barred: *Held*, that the payment must be attributed as made exclusively in respect of the note not barred, and that the effect was as to it to prevent the operation of the statute. — *Nash v. Hodgson*, 474. •

See PRINCIPAL AND SURETY.

ASSETS.

* 815 A testator, after directing payment of all his debts, devised the residue of his freehold and copyhold estates to trustees, upon trust to sell and absolutely dispose of the same, and he directed the moneys to arise from such sales should be deemed to be part of his personal estate, and that the rents and profits of the hereditaments, till their sale, should be deemed to be part of the annual income of his personal estate, and that the same moneys, rents, and profits should be subject to the disposition thereafter made concerning his personal estate and the annual income thereof respectively; and as touching his personal estate, he bequeathed the same to the trustees, upon trust to invest the same in consols and pay certain legacies. The testator made no disposition of the residue of his estate: *Held*, impugning the authority of *Chitty v. Parker* (4 Bro. C. C. 411), and approving that of *Roberts v. Walker* (1 Russ. & M. 752), that the real and personal estate was constituted a blended fund, and applicable, *pari passu*, in payment of debts and legacies: *Held*, also, that the heir was not entitled to an inquiry as to the relative value of the real and personal estates, with a view to ascertain the amount for which he was liable to contribute, but that a sale of such real estate must be made. — *Simmons v. Rose*, 411.

See EXONERATION.

BANKERS. See BANKRUPTCY, 12, 13.

BANKRUPTCY.

1. Where a mortgagee submitted the question of the validity of his security
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to the jurisdiction of the commissioner, on an application of the petitioning creditor to set it aside: *Held*, that the commissioner in deciding the question was acting judicially and not as an arbitrator, and that his decision was subject to appeal.

An assignment of the machinery and effects of a trader necessary for carrying on his trade, and comprising all his property except his household furniture and book debts, which were of small value, he being at the time in insolvent circumstances: *Held*, to be fraudulent and void against the assignees on his becoming bankrupt. — *Ex parte Bland, In re Murgatroyd*, 757.

2. It is in general inexpedient to annex to a certificate a condition that it shall not afford protection against particular debts.

Accommodation bill transactions are not regarded with favour, and a bankrupt who has engaged in such dealings must expect them to be subjected to a rigid investigation; but where such a bankrupt had not been shown to have been guilty of any dishonesty, or to have represented that the bills were not accommodation bills, the Court considered such transactions not sufficient ground for suspending * the certificate for two years, without protection, as regarded * 816 liability in respect of the bills. — *Ex parte Hammond, In re Hammond*, 699.

3. Attempted concealment by a bankrupt of property, although of small intrinsic value, and prized by him for the sake of family recollections and associations, held sufficient ground for refusing to disturb in his favour a suspension of his certificate for eighteen months without protection. — *Ex parte Warwick, In re Warwick*, 749.

4. Where a bankrupt has been negligent, careless, rash, improvident, or lavish, there may be differences of opinion as to granting him a certificate as to its class, or as to the conditions (if any) which should be annexed to it. But in a case where there had been wilful falsehood and dishonesty their Lordships, reversing the decision of a commissioner, refused to allow the certificate. — *Ex parte Dobson, In re Strong*, 781.

5. Want of fidelity in a solicitor cannot, upon a question of certificate, be visited with merely slight penalties, and public interest being concerned in the matter, no private dealing can amount to a condonation of the offence.

Where, therefore, solicitors received a client's money to be invested on good security, and applied it in repaying to one of them a sum which he had advanced on a mortgage of a reversionary interest in a trust fund (a transfer of the security to the client being prepared), and afterwards the transferor, who was one of the trustees of the trust fund, procured the concurrence of the *cestuis que trustent*, and also of his co-trustees (to whom he never disclosed the transfer), in selling out the fund, and thus realized the mortgage money and applied it to his own use, but continued to pay the interest to the client, to whom he represented the mortgage as still subsisting: *Held*, the solicitor having

become bankrupt, that his certificate had been properly refused, and that the client's having continued to correspond with him after discovering the misconduct, did not alter the case. — *Ex parte Selby, In re Selby*, 783.

6. In 1846, L. lent a sum of money to P., to enable him to purchase the requisite amount of shares in two public companies to qualify him for the office of director in each, and P. assigned the shares in both the companies in which he had become director, to L., as a security for the loan. The qualification for the office of director in one of the companies, which was constituted by Act of Parliament, would have been lost by the disposal or reduction of the amount of that qualification, and the provisions of the deed, by which the other company was constituted, required that its directors should be possessed of or entitled to the requisite amount of shares in their own right. In June, 1854, P. * signed a declaration of insolvency, upon which he was adjudicated a bankrupt, the shares then standing in his name, but five days previously L. gave notice to the directors of both companies of the assignment to him. At the time of his bankruptcy P. was actually a director of one of the companies, and out of office by rotation in the other, in which he probably would have been re-elected: *Held*, that the shares in neither company were in the possession, order, or disposition of P. at the time of his bankruptcy, with the consent of the true owner. — *Ex parte Littledale, In re Pearse*, 714.
- * 817 7. Personal service of a trader-debtor summons under the 78th section of the Statute 12 & 13 Vict. c. 106, means showing the original summons and leaving a true copy.
A document in which the signature of the commissioner is not copied is not a true copy of the summons.
An omission on the part of the trader to object to this defect at the time of the service: *Held*, no waiver of the objection within the 80th rule. — *Ex parte Tindall, In re Tindall*, 741.
8. A covenant by sureties that the principal debtor would pay a debt by three yearly instalments, held on the principal debtor becoming bankrupt after payment of the first, and before the time for payment of the second instalment, to be a contingent liability, properly the subject of a claim under the 168th section. — *Ex parte Barwis, In re Strahan*, 762.
9. A., and B. his surety, entered into a bond for payment by instalments of a debt of A., and also of interest and premiums on a policy. As part of the same arrangement A. and C. (his partner) entered into a counter security to B. by way of joint covenant of indemnity. A. and C. became bankrupt, and the condition of the bond having been fulfilled up to the date of the *fiat*, was afterwards broken: *Held*, that B. who paid the amount could not prove against the joint estate of A. and C. on the counter security. — *Ex parte Meyer, In re Meyer*, 775.
10. Where a defendant to an action for injury to the plaintiff's property caused by the explosion of the defendant's steam-engine, consented at the trial to an order of reference, and the award was not made till

after the defendant's bankruptcy: *Held*, that the defendant had not before the bankruptcy contracted a liability to pay money upon a contingency within the meaning of the 178th section of the Bankrupt Law Consolidation Act. — *Ex parte Todd, In re Williamson*, 744.

11. A bankrupt had, in consideration of the payment of a sum of money to him by the vendors of goods, guaranteed the payment of the purchase-money by the purchasers according to the contract of purchase, viz., by the due honour of a bill of exchange accepted by the purchasers. * The bill did not fall due till after the *fiat* issued * 818 against the guarantor. On its being dishonoured: *Held*, that the vendors were entitled to prove. — *Ex parte Brook, In re Willis*, 771.

12. Executors had a balance in that character with bankers, who (with the customers' consent) invested part of it on securities not of a proper description for an investment by executors. The bankers made no inquiry as to the power of the executors to make the investment, but if they had made the inquiry all the information which they would probably have been able to obtain would have shown that the executors were residuary legatees, and that the balance was a part of the clear residue. The fact, however, was that the investment was a breach of trust, there being a codicil which the executors had kept back, but afterwards proved, constituting them trustees only: *Held*, on the bankers becoming bankrupt, that they had not so participated in the breach of trust as to entitle the *cestuis que trustent* to prove against their separate estates. — *Ex parte Barnewall, In re Biddulph, De Front's Executors' Case*, 801.

13. Where two of a firm of bankers had drawn out a balance standing to the account of customers in the character of executors, and had invested it in the names of themselves and two other trustees, upon an unauthorized security: *Held*, on the bankruptcy of the bankers, not to be a case for double proof against the joint estate and the separate estates of the two partners. — *Ex parte Barnewall, In re Biddulph, Wright's Executors' Case*, 795.

14. A trader debtor, after having on a summons under the 78th section admitted the demand of a creditor, petitioned under the 211th section for an arrangement, and obtained *ex parte* an order for protection to his person and property from all process: *Held*, that the order did not protect him from a petition for adjudication of bankruptcy or from adjudication thereon. — *Ex parte Walker, In re Haywood*, 752.

15. Where a bankrupt, who had executed a trust deed for the benefit of his creditors, had obtained an adjudication against himself, the validity of which was open to doubt, the Court suspended proceedings under it, at the instance of a creditor undertaking to apply for an adjudication on his own petition, although creditors' assignees had been appointed and opposed the application. — *Ex parte Taylor, In re Weeks*, 737.

BARON AND FEME. See MARRIED WOMAN.

BENEFICE.

A registered judgment against a clergyman does not create a charge upon his benefice entitling the judgment creditor to the appointment of a

* 819 receiver under 1 & 2 * Vict. c. 110. — *Hawkins v. Gathercole*, 1.

BILL OF COSTS. See **SOLICITOR**.

BILLS OF EXCHANGE. See **BANKRUPTCY**, 2.

BREACH OF TRUST. See **BANKRUPTCY**, 12, 13.

CALL. See **WINDING-UP ACTS**, 1.

CERTIFICATE. See **BANKRUPTCY**, 2, 3, 4, 5. **PRACTICE**.

CESTUIS QUE TRUST. See **PLEADING**.

CHARGE. See **BENEFICE**.

CHARITY.

1. A testatrix by her will directed her executors as opportunity might offer to apply such part or parts of the residue of her personal estate as by law might be legally applied to such purposes in the endowment of district churches or chapels in populous parishes: *Held*, affirming the decision of Vice-Chancellor WOOD, that this gift was good, not being within the provisions of the Statute of Mortmain.

A gift of personal estate, to be employed in the endowment of existing churches or chapels, is not void as being a gift of personal estate to be laid out or disposed of in the purchase of land.

A similar gift, applicable to churches and chapels to be hereafter erected, would be supported, *semble*.

Shares in an incorporated company are not an estate or interest in land within the meaning of the Statute of Mortmain; nor does it make any difference that the Act of Parliament incorporating the company does not contain a clause declaring the shares to be personal estate.

Arrears of rent are not an estate or interest in land within the meaning of the Statute of Mortmain. *Ware v. Cumberlege*, 20 Beav. 503, overruled. — *Edwards v. Hall*, 74.

2. The assent of the charity commissioners is not requisite to an application for the disposal of money paid into Court by a railway company on the purchase of land belonging to a charity.

The words "in any suit or matter actually pending," in the 17th section of the Charitable Trusts Act, 1853, refer to a suit or matter actually pending at the time of the application. — *In re Lister's Hospital*, 184.

3. When an estate is given upon trust to pay to a charity an income exactly equal to the then rents, the charity is entitled to the benefit of any increase; and *semble*, that the same rule would be applied if a portion of the rents not given to the charity were wholly dedicated to the
 * 820 exoneration of rents that * are so given from burdens which would otherwise fall on them; but the principle does not apply when the amount given to the charity does not equal the amount of the rent at the time.

A testator in 1652 devised to a corporation a farm, which he described as
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yielding 47*l.* a year, in trust and confidence to pay three annual sums of 20*l.*, 10*l.*, and 10*l.* for certain specified charitable purposes, but subject, as to the 20*l.* per annum, to a life-interest which he gave in it to his sister. He also directed that so long as the taxes for the maintenance of soldiers should continue, what the corporation could not "spare out of overplus of rent, viz., 7*l.*," should be deducted out of the annual sums in which his sister was not interested. By the same will the trustees were directed to purchase land sufficient to produce a certain income, the whole amount of which the testator directed to be applied in charity. The rents having increased, — *Held*, that the whole income of the farm was not given to charity. *Held*, also, that the corporation was not entitled to the whole surplus, but that the charity was entitled to forty forty-sevenths, and to have all necessary ordinary expenses of taxes, repairs, and costs of management paid out of the remaining seven forty-sevenths; and that, subject thereto, the seven forty-sevenths belonged to the corporation beneficially.

Seem, that it is the duty of an appellate jurisdiction to leave undisturbed a decision in which it is not thoroughly persuaded that there is error.

Where the Court sees clearly the intention of the founder of a charity, no argument founded on length of time can prevail against it. — *Attorney-General v. The Corporation of Beverley*, 256.

See EVIDENCE.

CHIEF CLERK. See PRACTICE.

CLERGYMAN. See BENEFICE.

COMMITTEE. See WINDING-UP ACTS, 2.

COMMON, TENANT IN. See ADVOWSON.

COMPANY. See MINE. WINDING-UP ACTS, 1.

CONSIDERATION. See UNDUE INFLUENCE. VOLUNTARY INSTRUMENT.

CONSTRUCTION. See APPOINTMENT. CHARITY, 3. STATUTES, CONSTRUCTION OF. WILL, 1, 2, 3, 4, 5, 6.

CONTEMPT. See INFANT.

CONTINGENT DEBT. See BANKRUPTCY, 8, 9, 11.

* CONTINGENT LIABILITY. See BANKRUPTCY, 10.

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CONTRIBUTION. See ASSETS. PLEADING. WINDING-UP ACTS, 2.

CONTRIBUTORY. See WINDING-UP ACTS, 1.

COPYRIGHT.

Publishers agreed with an author to print, reprint, and publish a work by him at their own risk, on the terms of dividing equally with him any profits that there might be after payment of all expenses; and that if all the copies should be sold, and another edition should be required, the author should make all necessary alterations and additions, and the publishers should print and publish a second and subsequent editions on the same terms. After the publication of the first edition the firm of the publishers was changed, and the interest of the old firm in the work was expressed to be assigned to the new firm. The author prepared and the new firm published a second edition without any new agreement being entered into. Afterwards, a partner in the new firm (the only remaining

member of the old firm) became bankrupt, and his assignees, with the solvent partner, sold and assigned to other law publishers all the interest of the firm in the work and all the unsold copies: *Held*, that the purchasers had no share in the copyright of the work, and were not entitled to an injunction to restrain the publication of a third edition by another publisher with the author's concurrence, the agreement being held to be of a personal nature on both sides, and the benefit of it not assignable by either party without the others' consent. — *Stevens v. Benning*, 228.

COSTS. See **SOLICITOR**.

CREDITOR. See **BANKRUPTCY**, 15. **FRAUDULENT DEED.** **JUDGMENT**, 1, 3. **WINDING-UP ACTS**, 1.

CREDITORS' SUIT. See **DECREE**.

COUSINS. See **WILL**, 6.

DEBTOR. See **BANKRUPTCY**, 15.

DEBTOR AND CREDITOR. See **FRAUDULENT DEED.** **JUDGMENT**, 1, 3. **WINDING-UP ACTS**, 1.

DEBTS. See **ASSETS**.

* 822 * **DECREE.**

In a creditors' suit for the administration of real estate subject to a mortgage having priority to the claims of creditors, a sale of the estate free from the mortgage cannot be directed without the consent of the mortgagee, whether he is a party to the suit or not. If, however, the mortgagee is a party to the suit, the direction will not be made in the common alternative form, namely, that the property shall be sold free from his security if he concurs in the sale and subject to it if he does not concur; but the Court will require the mortgagee to elect at once whether he will concur or not. — *Wickenden v. Rayson*, 210.

See **JUDGMENT**, 1.

DEVISE. See **WILL**, 7.

DIRECTOR. See **WINDING-UP ACTS**, 2.

DISCLAIMER. See **TRUSTEE ACT**.

EASEMENT. See **PUBLIC HEALTH**.

EVIDENCE.

Where a tenant of land for life or for years or at will has lands of his own adjoining to that which he so holds as tenant, it is his duty to keep the boundaries between them clear and distinct, so that at the expiration of the tenancy the reversioner or remainder-man may be able without difficulty to resume possession of what belongs to him; and if the person having such partial interest neglects this duty, and suffers the boundaries to be confused so that the reversioner or remainder-man cannot tell to what lands he is entitled, this Court will give relief by compelling the persons who have occasioned the difficulty, to make

good, out of what may be considered to be in the nature of a common fund, that portion of it which belongs to another, but in order to obtain this relief it must be shown that the tenant is in possession of the specific land originally demised.

An information on behalf of the poor of a parish, stated an agreement dated in 1634, by the then Earl of Portland, which recited, that there lay in his park at R., divers parcels of land which contained about six and a half acres, and belonged to the poor of the parish, for which lands, lying dispersed in his grounds, being theretofore ordained for good and charitable uses, the earl was desirous to give a full yearly rent and satisfaction, and thereby promised and agreed to pay to the churchwardens and overseers of the parish for the time being yearly the sum of 6*l.*, and the earl thereby promised and agreed to make such further assurance thereof as by counsel * should be advised, and * 823 to set out sufficient land of a better value for performance thereof, which he would either tie for the payment of the yearly rent, or otherwise assure and convey to such person and persons and their heirs as by the vestry of the parish should be nominated to be feoffees in trust for the same. No conveyance was shown to be made in pursuance of this agreement; but it was in evidence, that the park of the earl, including the six and a half acres, originally consisted of five hundred and fifty acres, of which the defendant was in possession of thirty-one, his predecessors in the estate having, since 1786, covenanted to indemnify the purchasers of the other portions of the park from the payment of the annual rent of 6*l.*, which, in all the conveyances since 1786, was described as an annual rent-charge paid to the parish, but which in the parish books was expressed to have been received for rent of parish land; in the year 1849, the defendant's ancestor had accepted a receipt for the 6*l.* as for "rent for parish land:" *Held*, that in order to make the payment operate as an estoppel so as to prevent the defendant disputing the fact that the six and a half acres formed part of his estate, it was essential to make out that the payments had been from time to time made by him and his predecessors as for rent for land of which he and they were tenants, and therefore having regard to the only evidence adduced by the relators, namely, the entries in the parish books, the defendant was not estopped from denying that he was possessed of the six and a half acres of land originally demised by the parish to the earl.

Although the title-deeds of a person seised of land are not in general admissible in evidence against third persons to prove the truth of the facts therein asserted, yet, where, as in the present case, they are offered to show, not that a certain sum was due and paid for a rent-charge, and not for rent of land in the occupation of those who made the payment, but to show what the intention in making that payment probably was, and what they supposed their rights and liabilities to be, the deeds are clearly admissible.

Where, as in this case, a person makes a payment expressly or impliedly

on account of something else than the rent of land of which he is tenant, such a payment is not a payment of rent within the 48th section of the Act 3 & 4 Will. 4, c. 27, and under such circumstances a defence founded on that statute is a complete bar. — *Attorney-General v. Stephens*, 111.

See UNDUE INFLUENCE.

EXCHEQUER LOAN COMMISSIONERS. See STATUTES, CONSTRUCTION OF.

EXECUTORY DEVISE. See WILL, 7.

* 824 * EXONERATION.

A mortgagor devised his real and personal estate to his wife; she died without paying off the mortgage: *Held*, in a case not falling within the Act 17 & 18 Vict. c. 113, that her heir was not entitled to have the mortgage paid out of the personal estate of the mortgagor. The decision in *Scott v. Beecher* (5 Madd. 96) followed. — *Swainson v. Swainson*, 648.

See ASSETS.

FEEES. See OFFICER.

FEME COVERT. See MARRIED WOMAN.

FISHERY. See PUBLIC HEALTH.

FORFEITURE. See MINE.

FRAUD. See BANKRUPTCY, 3. SOLICITOR. UNDUE INFLUENCE. VENDOR AND PURCHASER.

FRAUDULENT DEED.

A trader, being in insolvent circumstances, agreed to sell his business and stock in trade in consideration of a money payment, and that the purchaser should, during the joint lives of the trader and his wife, pay the former an annuity equal to one-fourth of the profits, and a contingent annuity to the wife if she survived her husband equal to one-sixth of the profits. The trader having died, and a creditor's suit having been instituted for the administration of his assets: *Held*, that the annuity to the wife was void as against creditors under the Act 13 Eliz. c. 5, and that it was quite competent for the creditor to impeach the annuity without seeking to set aside the whole transaction of which it was a part; and there was a provision in the decree that it was to be without prejudice to any claim of the widow upon the estate of her husband if there should ultimately be a surplus after payment of creditors. — *French v. French*, 95.

See BANKRUPTCY, 1. JUDGMENT, 3.

GIFT. See VOLUNTARY INSTRUMENT.

GIVING TIME. See PRINCIPAL AND SURETY.

GROUND RENT. See VENDOR AND PURCHASER.

GUARANTEE. See BANKRUPTCY, 11.

* HEALTH. See PUBLIC HEALTH.

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HEIR. See ASSETS. TRUSTEE ACT.

HOUSE OF LORDS. See OFFICER.

HUSBAND AND WIFE. See MARRIED WOMAN.

IMPLICATION. See APPOINTMENT.

INADEQUACY. See UNDUE INFLUENCE.

INCUMBRANCE. See EXONERATION. JUDGMENT, 1, 2.

INFANT.

On a petition by a female infant under the Act 18 & 19 Vict. c. 43, praying a reference to approve of a proper settlement, and stating that the intended marriage had the sanction and approbation of the infant's father, the Lord Chancellor made the order without directing any inquiry as to the propriety of the marriage. The provisions of the Act do not impose on the Court any other duty than that of looking to the propriety of the settlement, though this may sometimes lead to an inquiry as to all the circumstances connected with the marriage. — *In re Dalton*, 201.

INJUNCTION.

A manufacturer who has adopted a trade-mark to designate some particular article as made by him has a right to the assistance of the Court to prevent any one from so using the same or any similar mark as to induce purchasers to believe, contrary to the fact, that they are buying that particular article to which the mark was originally applied. In a case, however, where the mark consisted of a label in a certain form, and it was shown that in very many instances labels the same as or similar to it might be sold for a legitimate purpose, the Court, in the absence of any proof of actual fraud, refused to restrain the printing and sale of such labels until the manufacturer, who alleged that they were used for a fraudulent purpose, had established his case by an action at law. — *Farina v. Silverlock*, 214.

See COPYRIGHT. PUBLIC HEALTH.

INSOLVENT.

The devisee of an insolvent debtor who had taken the benefit of the Act 5 & 6 Vict. c. 116, and who had obtained a release in full from all his creditors: *Held*, entitled to sustain a bill in equity in respect of surplus real property which had been conveyed by the official assignee, without going * through the process of applying to the insolvent * 826 Court for an order revesting the property in the assignee of the insolvent. — *Wearing v. Ellis*, 596.

See JUDGMENT, 1.

ISSUE. See WILL, 5.

JOINT AND SEPARATE DEBT. See BANKRUPTCY, 12, 13.

JOINT-STOCK COMPANY. See WINDING-UP ACTS, 1, 2.

JUDGMENT.

1. A decree in equity for the payment by the defendant to the plaintiff of a sum of money on or before a certain day, *held*, in reference to the provisions of the Act 1 & 2 Vict. c. 110, not to confer any priority as against a deed executed by the defendant, conveying his freehold estate in a register county to trustees for the benefit of his creditors, or as against a vesting order made in the defendant's insolvency, the deed having been executed, and the vesting order having been made, previously to the registration of the decree. *Held*, also, that the non-registration of the deed and of the vesting order until after the registration of the decree was immaterial, it being proved that the plaintiff had notice of the deed and of the vesting order when he registered the decree. — *Lee v. Green*, 155.

2. A., B., and C. were judgment creditors of D., A. and B. having priority to C.: A. and B. subsequently omitted to re-register their judgments within five years from their previous registration: C. duly registered within the five years: *Held*, that A. and B. did not thereby lose their priority to C.

The effect of the provisions of the 4th section of the Act 2 & 3 Vict. c. 11, is to deprive the judgment creditor who omits to re-register within five years of protection against subsequent purchasers, mortgagees, and creditors, but not to alter his position as to previous purchasers, mortgagees, and creditors.

The circumstance that a re-registration is not within five years from the previous registration does not make it ineffectual as against subsequent purchasers, mortgagees, and creditors. •

The decision in *Shaw v. Neale* (20 Beav. 157), as to the effect of omitting to re-register within five years, observed upon and in substance overruled. — *Beavan v. The Earl of Oxford*, 492.

3. In a suit to settle the priorities of incumbrancers on a testator's estate, the chief clerk by his certificate found a voluntary settlement ranking 1, and A. and B. judgment creditors ranking 2 and 3, but he also found that B.'s judgment, which was before the Act 1 & 2 Vict. c. 110, was of prior date to * the voluntary settlement: *Held*, that although as between A. and B. the former upon a question of registration was entitled to priority, yet that independently of such question, and having regard to the date of the voluntary settlement and to the provisions of the 6th section of the Act 2 Vict. c. 11, B. was prior both to the voluntary settlement and to A.

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A judgment creditor is not a purchaser within the meaning of the Statute 27 Eliz. c. 4, and has therefore no title on that ground to set aside a prior voluntary settlement.

The 13th section of the Act 1 & 2 Vict. c. 110, does not confer on the judgment creditor any right against a person claiming under a voluntary settlement previously made by the judgment debtor. The decision in *Watts v. Porter* (3 E. & B. 743) observed upon. — *Beavan v. The Earl of Oxford*, 507.

See BENEFICE.

LAND. See PUBLIC HEALTH.

LEGACY. See ASSETS. WILL, 1, 4.

LENGTH OF TIME. See CHARITY, 3. EVIDENCE. SOLICITOR.

LIMITATIONS. See APPROPRIATION OF PAYMENTS. CHARITY, 3. EVIDENCE. STATUTES, CONSTRUCTION OF. WILL, 5.

LUNATIC.

Where the tenant in tail in possession is a lunatic, the Lord Chancellor has authority under the Act 3 & 4 Will. 4, c. 74, to consent to the first tenant in tail in remainder barring the subsequent limitations on a proper case being made out for the exercise of that authority. The decisions in the cases of *Re Blewitt* (3 Myl. & K. 250) and *Re Wood* (3 Myl. & Cr. 266) overruled. — *In re Blewitt*, 187.

MANAGING COMMITTEE. See WINDING-UP ACT, 3.

MARRIED WOMAN.

A testator gave a legacy to a married woman upon condition that she conveyed within twelve months an estate devised to her by another testator for her separate use with a clause against anticipation: *Held*, that the Court had no power to interfere for the purpose of enabling the married woman to comply with the condition, though to have done so would have been greatly for her benefit. The decision * in *Wall* * 828 v. *Wall* (15 Sim. 513) observed upon. — *Robinson v. Wheelwright*, 535.

MINE.

An adventurer in a mining company, the rules of which did not contain any provision for the forfeiture of shares on non-payment of calls, received notice from his co-adventurers and co-lessees of the mines, that unless his arrears of calls were paid up, his shares would be forfeited on a specified day. He replied by denying the right to forfeit his shares. A resolution extending the time for payment was then communicated to him, to which he replied by denying the right to deprive him of his share in the lease. Some months after the extended time had expired, he received from the co-adventurers another application for payment of his arrears, of which he took no notice until more than six months had elapsed, when he claimed to be still a partner. Two years afterwards he filed a bill for an account: *Held*, that he was entitled to be still considered a partner.

Although mining partnerships differ in many respects from others, and it would be often unjust to allow a partner to participate in the success of such a speculation who had omitted to contribute to it while doubtful, it would be scarcely less unjust to allow, in all cases, the partners who have paid, as against one who has not, to take the law into their own hands and appropriate to themselves the whole profits.

Every such case depends on its own circumstances, and particularly on the question whether there has been a purpose of abandonment on the part of the partner in default. — *Hart v. Clarke*, 232.

MISREPRESENTATION. See VENDOR AND PURCHASER.

MORTGAGE.

A mortgagor, having made two successive mortgages of his estate to different persons, purchased the estate from the first mortgagee selling under a power of sale contained in his mortgage: the purchase-money was not sufficient to pay off the first mortgage: *Held*, that the mortgagor could not by this purchase defeat the title of the second mortgagee.

Whether this would be the case if the estate had been sold to a stranger and subsequently purchased from such stranger by the mortgagor, *quære*. — *Otter v. Lord Vaux*, 638.

See DECREE. EXONERATION. STATUTES, CONSTRUCTION OF.

MORTMAIN. See CHARITY, 1.

NOTICE. See JUDGMENT, 1.

* 829 * NUISANCE. See PUBLIC HEALTH.

OFFICER.

On the death of an usher of the Court in 1702, a large sum, for which as usher he was accountable, was due from him: in a suit instituted for the administration of his estate, more than sufficient was realized to liquidate the amount, and all sums actually claimed were paid: in 1719 the Court ordered a fund sufficient to answer the unclaimed sums to be invested, and directed the interest to be paid to the representative of the deceased usher until further order; similar orders for payment of the interest were from time to time down to 1833 made on the application of the existing representative of the usher; and in 1854 a petition was presented for the same purpose by the then representative. On a full discussion of the case, and on the petition being amended, an order was made for the transfer to him of the principal fund.

Whether there can be an appeal to the House of Lords upon a matter relating to the suitors' fund, *quære*, by the Lord Chancellor. — *Trevor v. Blucke*, 170.

ONUS PROBANDI. See UNDUE INFLUENCE.

ORDER AND DISPOSITION. See BANKRUPTCY, 6.

PARTIES. See INSOLVENT PLEADING.

PARTNERS. See BANKRUPTCY, 12, 13.

PARTNERSHIP. See MINE.

PATENT.

1. An agreement was entered into between four persons who were interested in certain patents and inventions relating to gutta-percha, that all patents taken out or in the course of being taken or intended to be taken out, or that might at any time thereafter be taken out, by any or either of them, or on account of and for the benefit of any or either of

them, in relation to the preparation and application of gutta-percha or the manufacture of any articles therefrom, should be assigned to trustees and held for their common benefit. Subsequently one of the parties took out a patent for "improvements in apparatus and machinery for giving shape and configuration to plastic substances," and refused to assign the patent to the trustees, alleging that it was not comprised in the agreement: *Held*, that the patent, * so far as * 830 it related to gutta-percha, was subject to the trusts of the agreement, and that it could not be treated as not being so because it was for machinery which might be applied to the manufacture of articles of gutta-percha, and not for the manufacture of any such articles. — *Bewley v. Hancock*, 391.

2. A contractor for certain harbour works had in the progress of his undertaking invented an apparatus which greatly facilitated the works, but which could only be tested in a place accessible to the public. After having used the apparatus for four months in the progress of the works, he applied for a patent: *Held*, that such user amounted to a dedication to the public, and that he was not entitled to a patent. — *In re Adamson's Patent*, 420.

3. An application under the 2d section of the Act 16 & 17 Vict. c. 115, for the inspection of the provisional specification of certain letters-patent, on the ground that the subject-matter was the same as that for which the applicant had obtained a patent, refused.

Letters-patent sealed in a case where the evidence showed great similarity between the alleged invention and one for which a patent was already in force. — *In re Tolson's Patent*, 422.

PAYMENT. See APPROPRIATION OF PAYMENTS.

PENDING PROCEEDING. See CHARITY, 2.

PLAINTIFF. See INSOLVENT.

PLEADING.

Although one of two executors or trustees may sue the other executor or trustee for contribution in respect of a breach of trust without making the *cestuis que trust* parties to the suit, yet where such *cestuis que trust* have participated in the breach of trust, they are necessary parties. — *Jesse v. Bennett*, 609.

See INSOLVENT.

POWER.

1. A donee of a power of appointment by deed or will appointed by deed the whole fee, reserving a power of revocation and new appointment, exercisable by deed. By a subsequent deed she revoked the uses, trusts, and powers limited and appointed by the former appointment, and appointed the whole fee, reserving a power of revocation and new appointment, exercisable by deed. By a third deed she revoked the uses, trusts, and powers limited and appointed by the last appointment, but declared no new uses: *Held*, that she had not by these deeds precluded herself from exercising the original power by way of testamentary appointment.

- A power is not necessarily exhausted by a revocable appointment, and
- * 831 * if such an appointment is revoked without having been acted upon, the power is generally, if not universally, still exercisable.

A power of appointment by deed or will is a single power.

A power of revocation and new appointment confers two distinct powers which may be exercised at different times. *Montague v. Kater* (8 Exch. 507) approved of. — *Evans v. Saunders*, 654.

2. A donee of a power of appointment over a gross sum of money which in default of appointment was to be divided equally among her children, appointed a specific sum which she described as being "part of" the gross sum; but she did not make any appointment of the residue. The gross sum proving deficient: *Held*, that the specific sum appointed was to be paid in full, and not ratably out of the deficient gross sum. — *Booth v. Alington*, 613.

See APPOINTMENT.

PRACTICE.

On an inquiry directed at the hearing the chief clerk certified that the advance of the 2000*l.* was a gift and not a loan: *Held*, that whatever effect this certificate might have on the hearing on further consideration, it could not be disputed by a party who had neither taken out a summons nor moved to have it varied. — *Smith v. Armstrong*, 150.

See BANKRUPTCY, 7. INFANT.

PRECATORY WORDS. See WILL, 2.

PRESENTATION. See ADVOWSON.

PRESUMPTION. See EVIDENCE. UNDUE INFLUENCE.

PRINCIPAL AND SURETY.

- Indorsees of bills of exchange as a security for a floating balance due on the accounts between them and the drawer had notice that the acceptor was a surety for the drawer. They afterwards entered into an agreement with the latter that the existing debt should be liquidated by the drawer building for them certain ships, and should, in the mean time, be secured by a policy of assurance: *Held*, 1. That time was thus given to the principal debtor, and that the surety was released in equity, if not at law also. 2. That a creditor who holds a floating guarantee from a surety cannot, without the surety's consent, give time to the principal debtor as to a portion of the debt, without reserving the creditor's rights against the surety, and yet hold the surety liable for that portion. 3. That whether the acceptor could or could not use, by way of defence to an action by the holders of the bills, the giving of time by them to the drawer, he was not bound to do so, but might (at the risk of costs) defend the action on other grounds,
- * 832 * and also institute a suit for equitable relief and an injunction to restrain the proceedings at law, though if the matter had been pleaded at law, and the Court of Law had adjudicated on the plea, the case might have been different. — *Davies v. Stainbank*, 679.

See BANKRUPTCY, 8, 9.

PRIORITY. See JUDGMENT, 1, 2, 3.

PROCESS. See BANKRUPTCY, 14.

PROOF. See BANKRUPTCY, 10, 11, 12, 13.

PROTECTION. See BANKRUPTCY, 14.

PROTECTOR. See LUNATIC.

PUBLIC BODY. See PUBLIC HEALTH.

PUBLIC COMPANY. See STATUTES, CONSTRUCTION OF. WINDING-UP Acts, 1, 2.

PUBLIC HEALTH.

Under the 45th, 46th, and 145th sections of the "Public Health Act, 1848," providing that the local boards may make necessary sewers through or under any lands whatever, and cause them to be emptied into such places as may be fit and necessary, provided that nothing in the Act shall authorize the boards to use, injure, or interfere with any water-course, stream, river, &c., in which the owner of any lands may be interested, without the consent of such owner: *Held*, 1. That persons having a right to watering-places in a river adjoining their lands, for the use of their cattle, are interested in the river within the meaning of the proviso, but would not be able to maintain an action for an interference with their rights, unless they were injured by such interference. 2. That works of a local board of health, producing an out-fall of the sewage of a town above such a watering-place, was such an interference as to cause injury to the land-owners, but that whether this was established or not, it ought (if not consented to by them) to be restrained by injunction, being the act of a public body exceeding its powers. 3. By CRESSWELL and WILLIAMS, Js., *dubitante* TURNER, L. J., that a right of fishing is within the term "land" according to the interpretation clause of the Public Health Act, 1848. — *Oldaker v. Hunt*, 376.

PUBLIC POLICY. See SOLICITOR.

PURCHASER. See JUDGMENT, 3.

PURCHASE, WORDS OF. See WILL, 5.

* RAILWAY COMPANY. See CHARITY, 2.

* 833

RECEIVER. See BENEFICE.

REGISTRATION. See JUDGMENT, 1, 2, 3.

REMOTENESS. See THELLUSSON ACT.

RENT. See EVIDENCE.

REPUTED OWNERSHIP. See BANKRUPTCY, 6.

RESCINDING. See VENDOR AND PURCHASER.

RESIDUARY LEGATEE. See WILL, 1, 4.

RESIDUARY TRUST. See POWER.

REVESTING ORDER. See INSOLVENT.

SALE. See VENDOR AND PURCHASER.

SERVICE. See BANKRUPTCY, 7.

SETTLEMENT. See INFANT. LUNATIC.

SOLICITOR AND CLIENT.

1. After a long and unsuccessful litigation to recover an estate, a younger brother of the unsuccessful party, and the next to him in an entail claimed in the estate, entered into an agreement with him to pay what should be due in respect of the solicitor's bills of costs, with interest, on the principle of annual rests, and to commence a new litigation at his own risk in the name of the elder brother, who agreed, on these terms, to relinquish the estate to the younger brother. Shortly afterwards an agreement was entered into between the solicitor, who was also to conduct the new litigation, and the elder brother, that the solicitor should be paid in respect of the old costs a specified sum, being less than the costs out of pocket, unless the brothers or one of them came into possession of the estate, in which event the elder brother agreed that he or the younger brother would pay in respect of the old costs, another specified sum, being the full amount of the bills, with interest calculated on the principle of annual rests. The bills had not been taxed, but had been examined, though not minutely, by a friend of the client, who had been a solicitor. The new litigation was conducted by the solicitor with his own capital. It succeeded, and the brothers came into possession of the estate. Seven years after the agreement with the solicitor had been entered into, they sought * to set it aside on the ground of undue influence and insufficient advice. *Held*, that the agreement ought to be upheld.

Before the new litigation was completely closed, but after a successful verdict in it, the younger brother, on the eve of making an antenuptial settlement, signed a memorandum of agreement between himself, the elder brother, and the solicitor, whereby the brothers charged the estate with payment of all sums of money and bills of costs owing to the solicitor by both or either of the brothers, with lawful interest, on the principle of annual rests. At that time, the relation of solicitor and client, though not dissolved, had been loosened by differences between the solicitor and the brothers, and the influence arising from that relation did not subsist in its full force. The solicitor made no attempt to prevent the brothers from consulting other solicitors, and in fact the solicitor of the intended bride intervened, though not as the solicitor of the intended husband: *Held*, 1. That the agreement was not usurious. 2. That it was not merely voluntary, and that whether the term as to annual rests could have been maintained or not, the solicitor was entitled to abandon it, and enforce the rest of the agreement. 3. That the former agreement, as to the old costs, was binding on the younger brother under the latter agreement. 4. That interest was payable on the old costs for the interval between the dates of the two agreements, as well as during the rest of the time. — *Moss v. Bainbrigge*, 292.

2. H. and B. were clients of the same solicitor M., to whom B. gave an authority in writing to sell certain property. Acting on this authority,

M. entered into an agreement with H. to sell the property to him. *Held*, that this was a transaction in which there was a necessity for the utmost openness of dealing, and the Court, not being satisfied that this existed in the case before it, refused specific performance of the agreement entered into. — *Hesse v. Briant*, 623.

See BANKRUPTCY, 5.

SPECIALTY DEBT. See WINDING-UP ACTS, 1.

SPECIFIC PERFORMANCE. See SOLICITOR AND CLIENT.

STATUTE DEED. See LUNATIC.

STATUTES, CONSTRUCTION OF.

A harbour company was empowered by its Act of incorporation to raise money on mortgages of the works and tolls, which were not to be effectual until they were entered in the company's books by its clerk, and a memorial of the entry was indorsed on them: *Held*, that an unindorsed mortgage, regular in other respects, was effectual. Such provisions as these respecting * the indorsement depend on the * 835 purpose of the Act. If it be one of public concern, they are construed largely, as in the Annuity Acts, Shipping Acts, and the modern statutory provisions for registering judgments; but if not, the effect is limited by the purpose of the Act.

The true meaning of the Exchequer Loan Commissioners Acts is, that the commissioners have power to sell property comprised in their securities as against all persons over whom they have an absolute priority, but not as against prior incumbrancers, except so far as these may have conceded their priority. Therefore, where prior mortgagees of the works and tolls of a harbour agreed that, on the commissioners making an advance, the tolls should be applied — first, in paying interest on the commissioners' advances; secondly, in paying interest on the prior mortgages; thirdly, in reduction of the principal of the commissioners' advance till it was paid off, and, the tolls being insufficient to keep down the interest on the commissioners' advances, they sold the subject of their security to a railway company with notice of the agreement: *Held*, that the purchasers took subject to the charge of the prior mortgagees in respect of the interest on their securities.

The above agreement was made in 1818. In 1833, before the sale to the railway company, one of the prior mortgagees wrote to the treasurer of the harbour company complaining of non-payment of interest. The treasurer replied that no interest had been paid since 1821, as the income of the harbour left but a small surplus after payment of expenses, but that he was at all times willing to give information to the mortgagee or to any other gentleman who had embarked property in the undertaking: *Held*, that the agreement and the correspondence took the case out of the Statute of Limitations both as to principal and interest.

The above mortgages were in the nature of a Welsh mortgage, being in a form prescribed by the Harbour Act, whereby the works and tolls were demised until the mortgages were paid off: *Held*, that, whether the

mortgagees could proceed at law or not, they were entitled to sue in equity. — *Jortin v. South-Eastern Railway Company*, 270.

STATUTE OF LIMITATIONS. See APPROPRIATION OF PAYMENTS. CHARITY, 3. EVIDENCE. STATUTES, CONSTRUCTION OF.

SUMMONS. See BANKRUPTCY, 7, 14.

SURETY. See BANKRUPTCY, 8. PRINCIPAL AND SURETY.

* 836 * TAIL. See LUNATIC.

TENANTS IN COMMON. See ADVOWSON.

TENANTS IN TAIL. See LUNATIC.

THELLUSSON ACT.

- A testator gave his real and personal estate to trustees, in trust to pay an annuity to M. P. S., and if she should have children, to raise 4000*l.* for the younger children, and he gave the residue, "with the accumulation thereof, which I hereby direct my said trustee or trustees to place out on mortgages or in government securities in the public funds," upon trust for the eldest son of M. P. S., on his attaining twenty-one, and taking the testator's name, and if there should be no child of M. P. S., then on trust for E. B. T. upon attaining twenty-five, and taking the testator's name: at the expiration of twenty-one years from the testator's death, M. P. S. had no child: *Held*, that the will contained an express direction to accumulate, and that the case fell within the Thellusson Act.

Although the will contains no express direction to accumulate, yet, if an accumulation necessarily takes place, by reason of the form in which the property is given, the case falls within the Act, *semble*, by the Lord Chancellor and the Lord Justice TURNER.

Held, also, following the decision in the case of *Broughton v. Broughton* (1 H. L. Cas. 406), that the annuity to M. P. S. was primarily payable out of the personal estate, by the Lord Chancellor and the Lord Justice TURNER, *dubitante* the Lord Justice KNIGHT BRUCE. — *Tench v. Cheese*, 453.

TIME. See APPROPRIATION OF PAYMENTS. EVIDENCE.

TRUST. See THELLUSSON ACT. VOLUNTARY INSTRUMENT. WILL, 2.

TRUST DEED. See FRAUDULENT DEED. JUDGMENT, 1.

TRUSTEE. See BANKRUPTCY, 12, 13. PLEADING. UNDUE INFLUENCE.

TRUSTEE ACT.

- A testator devised lands in trust to sell for the payment of debts: the trustees disclaimed, and the heir-at-law could not be found: the lands were sold under a decree in a suit for administration, and an order was obtained under the Trustee Act, 1850, appointing the vendor's solicitor to convey to the respective purchasers: *Held*, by the Lord Chancellor, on the question being raised by one of the purchasers, that the provisions of
- * 837 * the 9th and 20th sections of the Trustee Act, 1850, applied to the case, and that the order which had been made was correct. — *Wilks v. Groom*, 205.

TRADE-MARK. See INJUNCTION.

TRADER DEBTOR. See BANKRUPTCY, 7, 14.

TRUST DEED. See BANKRUPTCY, 15.

UNDUE INFLUENCE.

Where a person holding a fiduciary character purchases from his *cestui que trust*, and the sale is complained of, this Court imposes the burden of proof upon the purchaser to show that all due protection has been afforded to the vendor; *aliter*, where no such fiduciary relation subsists.

Where, after the death of a vendor, the sale was impeached by his devisees on the ground that at the time of the sale he was an illiterate bed-ridden old man of seventy-one years of age, and had acted without independent professional advice, and had conveyed away the property in question of the value of 400*l.* for the consideration of a provision by way of board and lodging during his life, which only endured six weeks after the conveyance: *Held*, that in the absence of any fraud, and the evidence showing that he had declined to employ professional advice for himself, such a transaction was not impeachable on the ground of mere inadequacy of consideration. — *Harrison v. Guest*, 424.

See SOLICITOR.

USHER. See OFFICER.

VENDOR AND PURCHASER.

Bill filed by a purchaser to rescind a contract, the plaintiff alleging that he had been induced to enter into it by fraud and misrepresentation: it appeared that the advertisement out of which the contract arose was of the sale of six houses, total rental 131*l.* 6*s.* per annum, lease about seventy-five years, at a moderate ground-rent of 50*l.* a year, but what the plaintiff, who agreed to give 420*l.* for the property, found himself liable to take was an underlease of the houses at a rent of 50*l.* The Lord Chancellor, reversing the order appealed from, dismissed the bill without costs, being satisfied that though there was a misdescription of the property, there was no such substantial misrepresentation as called upon the Court to exercise its jurisdiction. — *Bartlett v. Salmon*, 33.

See SOLICITOR AND CLIENT.

* VESTING. See WILL, 7.

* 838

VESTING ORDER. See INSOLVENT. JUDGMENT, 1.

VOLUNTARY AGREEMENT. See SOLICITOR.

VOLUNTARY INSTRUMENT.

Mere declaration of trust by the owner of property in favour of a volunteer is altogether inoperative, and the Court will not interfere in such a case; *aliter* where there has been a change of legal ownership and so a trust constituted. Letters written by a mortgagee to the mortgagor

and persons interested under him, containing the expressions, "I now give this gift to become due at my death, unconnected with my will." "I hereby request my executors to cancel the mortgage-deed," &c. "I again direct and promise that my executors shall comply with my former request, that is, to cancel all deeds and papers I may have chargeable on the R. estate:" *Held*, not to operate either as a declaration of trust or as a valid gift. — *Scales v. Maude*, 43.

See FRAUDULENT DEED. JUDGMENT, 3.

WARD OF COURT. See INFANT.
WILL.

1. A testator having in the commencement of his will appointed his daughter to act in concert with his son to be guardian and executrix added, "I also appoint and desire in this my last will and testament that my son to be my executor and residuary legatee do jointly with my daughter, my executrix, who is to act independent of her husband and be guardian to the children:" *Held*, that the son alone was entitled to the residue. — *Langley v. Thomas*, 645.
2. A testator by his will gave certain portions of his property to one of his daughters and her children, and the residue, which was the greater portion, to another daughter and her children. By a codicil he said, "I cancel that part of my will settling on my daughters and their children my property, and my sons-in-law H. and A. may dispose of the property I leave for the good of their families:" *Held*, that the sons-in-law took absolute interests in the portions given by the will to their respective wives. — *Alexander v. Alexander*, 593.
3. The will of J. A. contained the following passage: "I forgive to my said nephew Jacob Appleford the debt of 2000*l.* which I advanced to him on loan:" the testator had, on occasion of his nephew going into partnership, advanced to him 2000*l.* for his own use, and had also at the same time lent to the partnership different * sums, the nephew's proportion of which would have amounted to about 2000*l.*: *Held*, that whether the 2000*l.* was to be treated as having been a gift to the nephew or not, the testator intended in the above passage to refer to it, and not to the proportion of the partnership debt due from the nephew. — *Smith v. Armstrong*, 150.
4. A testator by his will gave several pecuniary legacies, including one to his son E., and devised his freehold, copyhold, and leasehold estates to his sons T. and A. as tenants in common; and he appointed them his residuary legatees and executors. T. died, and by a codicil the testator appointed E. executor in the room of T. and revoked the legacies given to A. and E. by the will, and he appointed them "residuary legatees," and he declared that certain freehold and leasehold property comprised in his marriage settlement, and which he had power to appoint, should go to the "residuary legatees, his sons" A.

and E. *Held*, that the moiety of the real estate devised by the will to T. had lapsed and descended on A. as the testator's heir-at-law, he taking also the other moiety as devisee under the will: *Held*, also, that in this will the appointment of A. and E. to be "residuary legatees" did not pass to them the testator's real estate. — *Windus v. Windus*, 549.

5. A testatrix devised her real estates to trustees in trust as to the rents, issues, and profits thereof for all and every the children now or hereafter to be born of my niece M. C., who shall be living at my decease, during their lives, in equal shares, and for the survivors and survivor of them for life, &c., and after the decease of the survivor "in trust for all the lawful issue, male and female, of such of the children of my niece, now or hereafter to be born, as shall be living at my decease, in equal shares and proportions as tenants in common, and not as joint tenants, and the heirs of the body and respective bodies of all and every the issue of the said children, and on the death and failure of heirs of the body of any one or more of the issues of the said children," &c., in trust for the survivors, &c. At the testatrix's death her niece had two daughters, one of whom was married and had issue five children: *Held*, that the daughters of the niece took estates for life only, with remainder to their issue as purchasers. — *Parker v. Clarke*, 104.
6. Where a bequest is to "cousins" simpliciter, first cousins only will, in the absence of any thing to explain the meaning of the testator, be entitled. *Stoddart v. Nelson*, 68.
7. A testatrix devised to trustees certain freehold premises in trust to receive the rents, and after paying thereout all proper outgoings and applying thereout, if they thought * fit, towards the main- * 840 tenance of F. S., to let the residue accumulate until F. S. should have attained twenty-one and then to pay such accumulations to him, but if he should die under such age, without leaving issue living at his decease, then such accumulations should be applied for the benefit of the person to whom and in the like manner and form as the premises were limited, in the like event, and when F. S. should have attained twenty-one, then the trustees were to stand seised of the premises in trust for him in fee, but if he should not leave any issue living at his decease then the trustees should stand seised of the premises in trust for A. S. in fee, and if A. S. should not leave any issue living at her decease then over. F. S. attained twenty-one, and died without ever having had issue: *Held*, on the construction of the will, that the premises vested in F. S. in fee on his attaining twenty-one, subject to be divested in the event of his dying without issue, which event having happened, the limitation over in favour of A. S. took effect. — *Smith v. Spencer*, 631.

See CHARITY, 3.

WINDING-UP ACTS.

1. By the provisions of a deed constituting a joint-stock company, it was

declared that the proprietor of each share should bring in the sum of 50% in respect of such share as and when called upon so to do in manner thereafter provided, and that each of the proprietors should be entitled to the profits, and liable for the losses of the company in proportion to his shares. The executor of a shareholder who had executed the deed of settlement being placed on the list of contributors of the company which was being wound up under the Joint-stock Companies Winding-up Acts: *Held* (the Lord Justices KNIGHT BRUCE and TURNER *dubitantibus*), that a call made by the Master under those Acts was not a specialty debt.

Every shareholder as a partner is liable to every creditor to the full amount of his demand, and the sum raised by the Master represents not any demand of the shareholders *inter se*, but the aggregate demand of all the creditors on the whole partnership. The solvent shareholders are bound to make up this sum not by virtue of any engagement contained in the deed, but because by the general rules of law every partner is liable to the whole of the demand in the partnership. *Per* the Lord Chancellor.

Whether the demand for contribution by a shareholder who has paid more than his ratable proportion would be such as to give him under the clause above referred to a claim by way of specialty or only as a simple contract debt, *quære*. — *Robinson's Executor's Case*, 572.

* 841 2. A. was, in his absence, chosen by the provisional committee of a provisionally registered railway to be * one of the managing committee, to whom, by resolutions of the provisional committee then passed, power was given to allot shares and to apply the funds of the company in payment of expenses. The scheme having proved abortive, the allottees recovered their deposits in actions against A. and other persons who had been appointed to be members of the managing committee. The members of the managing committee thereupon appointed a sub-committee, of which A. was one, to take measures to protect the members of the committee. A. was a constant attendant at the meetings of the sub-committee, and took an active share in providing for some of the demands on the committee of management and resisting others. *Held*, that he thereby sanctioned and adopted the former proceedings of the managing committee, in which he had not taken part, and was liable to contribute in respect of them.

B., who was appointed and acted as a member of the managing committee of a provisionally registered railway company, with power to contract with engineers for the requisite surveys, &c., was one of the members liable in respect of an order given to the engineers, who afterwards, being unable to complete the contract by the required time, offered to forego it, and to substitute a contract for a part of the line only, on the terms that the completion of the latter within the time should not be required. At a meeting, at which B. was not present, the majority of the managing committee present resolved to accede to

the proposal. B. at a subsequent meeting opposed the confirmation of the resolution. Afterwards he concurred in resolutions for providing means of satisfying the engineers' demand among others: *Held*, that the substituted contract was only a modification of the contract, in respect of which B. was liable, and that under the circumstances B. was liable to contribute to the payment of the engineers' demand. Contribution may be enforceable on general principles of justice, independently of contract. — *Spottiswoode's Case*, 345.

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END OF THE SIXTH VOLUME.

